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ON COMMON LAW MENS REA

GERHARD O. W. MUELLER*

PREFACE: *Lambert v. California*: THE ISSUE

One hundred years of American complacency in matters of mens rea, only briefly interrupted by the forward-looking decision in *Morrisette v. United States*,¹ have come to an end with the otherwise insignificant case of *Lambert v. California*.² The subject matter regulated by the ordinance under which the conviction had been rendered in that case could have been any of thousands which are subject to regulation, the offensive ordinance or statute could have come from any jurisdiction,³ anyone might have been the defendant.

Mrs. Virginia Lambert had been accosted by municipal police officers on a street corner in the city of Los Angeles, searched on the spot, apparently for narcotics, handcuffed, shoved into a patrol car and hauled to the precinct station. Further search of her person, as well as questioning, revealed no evidence of any narcotics violation. However, the police did discover that Mrs. Lambert had once been convicted of forgery and that she had not registered with the chief of police, as required by a city ordinance.⁴

Mrs. Lambert had been unaware of the existence of this ordinance. By its own terms the ordinance did not provide for notice to affected parties like Mrs. Lambert, and in fact it was all but conceded that there was no reasonably conceivable way for Mrs. Lambert to learn of her duty to register. "A typical absolute liability offense," everyone might have said and left it at that. Mrs. Lambert was convicted. Her offer to prove ignorance was denied, and the conviction sustained.

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1. 342 U.S. 246 (1952), opinion by Mr. Justice Jackson, ending the spreading development of criminal liability without fault and limiting it to offenses roughly corresponding to the antiquated category of *mala prohibita*. *Morrisette* had been charged with a federal offense.

2. 355 U.S. 225 (1957).

3. *E.g.*, *United States v. Eramdjian*, 155 F. Supp. 914, 924 (S.D. Calif. 1957), upholding a federal registration act similar to that declared unconstitutional in *Lambert v. California*.

4. "The Los Angeles Ordinance makes it a crime for a 'convicted person' to be or remain in the city for more than five days without registering with the Chief of Police. § 52.39." "A 'convicted person' is comprehensively defined by § 52.38 of the Los Angeles Municipal Code to include anyone who has been convicted any place in the world since 1921 of any crime punishable as a felony or of certain other crimes." "Section 11.00 (m) of the Los Angeles Municipal Code provides that failure to comply with any of the mandatory requirements of the code is punishable by a fine of not more than \$500, or by imprisonment in the city jail for not more than six months, or both. Each day's violation is a separate offense." Brief for W. M. Christopher as Amicus Curiae, p. 8, *Lambert v. California*.

On appeal to the Supreme Court of the United States on due process grounds, a moral issue presented itself: Will this libertine democracy of ours continue to permit the conviction of persons who justifiably had no notion of wrong-doing when they conducted themselves in violation of law? That convictions of this sort are commonplace under our law is well known and needs no reiteration. That, from a moral point of view, such convictions cannot be condoned is likewise apparent to all but those lacking any moral constitution whatsoever. But our courts do not decide moral questions, unless they appear as legal issues. Amicus curiae phrased the moral question neatly in terms of law: "Does conviction under the ordinance in the absence of wrongful intent violate due process of law?"⁵

Obviously, the Attorney General for the State of California had to argue that "due process does not require that wrongful intent be an essential element of criminal legislation enacted under the police power for the protection of the public welfare and morals."⁶ The argument was simple enough: due process does not require mens rea; the ordinance, by its terms, made mens rea immaterial; therefore, the question of appellant's scienter or awareness of wrong-doing was completely irrelevant and all evidence pertaining to her well-nigh conceded⁷ ignorance had been properly excluded.

A provision of the California Penal Code specifies:

In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.⁸

The Attorney General for the State of California tried to avoid the impact of the statute by arguing that "the 'intent' referred to . . . is merely an intention to do the act which is in fact unlawful; it is irrelevant whether the doer knows he is acting unlawfully."⁹

What of "intent" as contrasted with "evil intent," or the brain activity resulting in physical motion or rest as contrasted with "mens rea," whatever that may mean? What of the moral issue of punishing those who were non-culpably unaware of wrong-doing? And of the utilitarian aspects of reforming or deterring those whose mind was neither bent on mischief nor chargeable with dereliction of duty? This is the jungle of mens rea which the courts have been only too eager to bypass in the past. Counsel for appellant must

5. *Id.* at p. 2, evidently referring to the deprivation of liberty (in case of imprisonment) or property (in case of fine), under the 14th Amendment to the U.S. Constitution.

6. Brief for Attorney General of the State of California as Respondent, p. 7, *Lambert v. California*.

7. *Id.* at pp. 7-8.

8. Cal. Pen. Code Ann. § 20 (West 1954).

9. Brief for Attorney General of the State of California as Respondent, p. 8, *Lambert v. California*.

have asked himself: would a majority of the court be bold enough to enter the jungle and to clear it up? On the other hand, if we regard it as an ethical truism that punishment of those who did not and could not have any awareness of wrong-doing is immoral, why should the court refuse to grant relief by placing the legal standard on the moral level? Yet, one hundred years of history show us that our courts have often delighted in being immoral in this matter. Can one hundred years of history be erased? If so, how should it be done?

I. WHAT IS MENS REA?

In the field of criminal law no question occupies today's scholars, reformers and legislators as much as that of the mental element of crime, mens rea. The interest is world wide. The American Law Institute expends considerable effort on it for purposes of the Model Penal Code.¹⁰ The Round Table on Criminal Law of the Association of American Law Schools has scheduled this topic for debate in 1958. In the scope of state codifications the topic is commanding more than ordinary interest.¹¹ In Britain a new look is being cast on the nature of mens rea.¹² In western Europe no topic of the criminal law is more hotly debated.¹³ From South America the impending publication of the most inquisitive study of the topic

10. Model Penal Code § 2.01-11, (Tent. Draft No. 4 1955) comments at 119-155; Model Penal Code § 2.07 (Tent. Draft No. 5 1956); see ALI Proceedings 170-207 (1956).

11. *E.g.*, Wisconsin: 5 Judiciary Committee Report on the Criminal Code 19-24, 34-36 (1953), well done, but of limited insight from the doctrinal point of view. Now Wisconsin Criminal Code, Wis. Stat. § 939.23, 939.43 (1955). See Remington, *Liability Without Fault Criminal Statutes—Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 Wis. L. Rev. 625. Puerto Rico: See the preliminary draft by Donnelly, Code of Correction for the Commonwealth of Puerto Rico—General Part §§ 3(2)(a), (b); 7; 8; 9; 11; 29 (1957) an excellent attempt to restore mens rea, but for the rule on violations, see § 11.

12. Edwards, *Mens Rea In Statutory Offences* (1955), which constitutes volume 8 of the English Studies in Criminal Science. Campbell, *The Resurgence of Mens Rea*, 32 N.Z.L.J. 310 (1956).

13. The extent of the German literature alone has increased so much since 1945 that even the most informed profess that they can no longer keep tab on the many run-away ideas on mens rea. For a critical survey of the literature until 1949 see Kaufmann, *Das Inrechtsbewusstsein in Der Schuldlehre des Strafrechts* (1949). The literature until 1954 has been considered in Mueller, *Mens Rea and the Penal Law Without It—a Study of the German Penal Law in Comparison to the Anglo-American Penal Law* (unpublished thesis in Columbia University Law Library 1955). For subsequent inclusive discussions see Lange, *Der Strafgesetzgeber und die Schuldlehre*, 11 Juristenzeitung (1956); Lang-Hinrichsen, *Zur Problematik der Lehre vom Tatbestand und Verbotssirrtum*, 12 J.R. 184 (1957). The legislative reform materials may be found at 2 Materialien zur Strafrechtsreform (1954). For a comparative study of mens rea in the principal European legal systems see Lang-Hinrichsen, *Die Schuld- und Irrtumslehre*, in 2.1 Materialien Zur Strafrechtsreform 381-428 (1954).

has been announced.¹⁴ And, even in the Soviet Union, an astonishing ration of printer's ink and paper has been apportioned for scholarly excursus on the topic.¹⁵ The reason for this renewed and heightened interest is, of course, that we simply do not know enough about this most important of all criminal law concepts, which is admittedly vital for crime repression. As the sciences penetrate deeper into the human mind, we lawyers get more and more frustrated about the short-comings of our standards and efforts. The more we learn scientifically about the human psyche, the more insecure we become in the matter of proper alignment of our criminal law along those newly-won recognitions. But certainly the task is not insuperable. In fact, we simply must come to grips with the problem, since everyone will agree that a criminal law, however well intentioned, which disregards human psyche is as useful for society as a police force of deaf, dumb, blind and lame, though otherwise honorable, citizens.

In order to be able to improve what we have in the nature of a mental element of crime, we must first ascertain what we have. The accounts of mens rea which we have in the storehouse of our legal literature are, with few exceptions,¹⁶ either antiquated, or—never meant to be accounts as such—superficial for the purpose of accounting, or else they leave so much to be desired that they are not very helpful.

Even the uninitiated should realize that a study of mens rea, not to mention a reform, is a vastly complex undertaking. I have no pretensions in this paper of solving all problems or curing all ills. But this much I do want to ascertain: what is mens rea? Is it a term of law, of psychology, or of ethics? An attempt must be made to ascertain how the courts have regarded the mental element of

14. 5 Jimenez De Asua, *Tratado De Derecho Penal*. See Blau, *Einige Bemerkungen zu dem Lehrbuch des Strafrechts von Jimenez de Asua*, 66 *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 297 (Germany 1954).

15. Raschkowskaja, *On the Question of the Degrees of Guilt*, *Sovetskoe Gosydarstve*, 58 (Russia Jan., 1955); 5 R.I.D. 70 (Germany 1956); Tschikwadse, *On some Questions of Soviet Penal Law*, 59 (Russia Sept., 1954); 3 R.I.D. 643 (Germany 1954); Ssergejewa, *On the Question of Individualization of Penal Responsibility*, *Sovetskoe Gosydarstve*, 33 (Russia Jan. 1951); 1 R.I.D. 6 (Germany 1952); and see Kielwein, *Die Schuld im sowjetrussischen Strafrecht*, 1 M.B1. Fachgr. Str. 5 (Germany 1951); Scheuerle, *Die Schuld im sowjet-russischen Strafrecht*, 2 M.B1. Fachgr. Str. 54 (Germany 1952).

16. Hall, *General Principles of Criminal Law* (1947); Williams, *Criminal Law—The General Part* (1953). These excellent works have influenced my thinking heavily, though perhaps not as much as they should have. To give more specific credit to them in this article would be an insuperable task. Likewise, I do not propose to specifically document every one of my departures from the views held by Hall and Williams, though on certain specially important issues this was found to be necessary.

crime by their positive actions and statements. We may then generalize our findings and define the resulting concepts. The accuracy of this concept must then be tested against the supposed exceptions. Thus, our inquiry is in two parts: I. What is common law mens rea? II. What exceptions to the common law mens rea requirement did the common law develop? The emphasis on common law, as opposed to modern statutory criminal law, is noteworthy, because we cannot talk intelligently about statutory criminal law until we are sure about the common law basis on which all Anglo-American statutory criminal law rests.

A. *The Act.*

There is no textbook on criminal law which does not begin with, or early make, the assertion that every crime is composed of an act¹⁷ and intent.¹⁸ By itself such a statement is misleading. For even in ordinary parlance we do not refer to that which is not the result of some sort of mental activity, popularly referred to as intent or voluntariness, as an act. Thus, if I am engaged in the activity of writing words on paper I do so because I intend to do so, which is to say that the event of writing would not have resulted but for my brain's command to my hand to bring about the event. Thus, intent is not something separate or in addition to the act, it is rather a part thereof. An act, therefore, is a psycho-physical

17. *Omissions* are treated as acts, and what will be said about acts applies with equal vigor to the psycho-physical concept of the omission. The two concepts frequently have been treated under the common name of *conduct* (not behavior! which smacks of greater irrationality than we wish to admit for the defendant who meets the mental test of the criminal law). Since acts are far more frequent in the criminal law than omissions, we can, without sacrificing too much accuracy, continue to refer to *acts* as including both acts and omissions, but with the caveat that we always deem the legally relevant omissions to be covered by our assertions. In other words, from now on we are talking of the more familiar term *act* as a synonym of the less familiar term *conduct*. J. Hall, with whom I am otherwise in complete agreement on this point, prefers to refer to acts as "voluntary" conduct. Hall, *op. cit. supra* note 16, at 252-78. This I deem unnecessary, since an involuntary act, in the psychological sense, is more in the nature of a spasm. Act, as I use the term, includes the notion of voluntariness. Professor Hughes' valuable article on *Criminal Omissions*, 67 Yale L.J. 590 (1958), appeared after completion of this manuscript and could not be fully considered. I am in abundant agreement with Professor Hughes' conclusion that "where inaction is evidently socially harmful, no good reason appears from shrinking from penal prohibition," and that "nothing inherent in the failure to act ought to mark it off from positive actions as a proper subject for penal law." *Id.*, at 636. I am in violent disagreement with Professor Hughes on his proposition that "conventional attitudes to mens rea, particularly with respect to ignorance of the law, are not adequate tools to achieve justice for those accused of inaction." *Ibid.* Nothing in Mr. Hughes' article proves that the considerations as to mens rea for omission need be any different from those for commission.

18. *E.g.*, May, *Law of Crimes* 3 (4th ed., Sears and Weihofen 1938); Miller, *Criminal Law* 16 (1934).

event. But not every psycho-physical event is an act because we know of human behavior which does not result from any conscious order of the brain, which is, rather, the result of an unconscious mental drive, perhaps the result of disease — though not necessarily so—in any event, of forces emanating from the unconscious mind over which the individual has no instantaneous control. And though in common parlance we speak of the act of an insane person, strictly speaking, what we observe a *demented* person doing is not an act at all, it is an event,¹⁹ though in a purely physical sense, by way of cause and effect, the result is attributable to the insane person.²⁰

The description of an act as a psycho-physical event in which a perceptible effect has been caused by conscious interaction of the mind and the functioning body, is regarded by many as old fashioned and outdated. A more modern answer given, quite frankly, does not carry us much further for purposes of our search for a definition of the legally relevant intention. The more modern answer simply takes into account that it is difficult to ascertain when the mental element of an act was of a conscious or voluntary nature and when it was a product of habit, urge, irresistible impulse or irrational causes, such as disease. Thus, one can say that we can truly talk of an *act*, as embodying the element of a conscious functioning of the mind, only when we can ascertain that the acting individual would have reacted to various stimuli in various ways, all as common and ordinary,²¹ and that his body would not have moved as it did had he chosen differently. We could lastly define an act, with H. L. A. Hart, as "a defeasible concept to be defined through exceptions" only, that is to say, the behavior of a person is no act in all cases in which, for social reasons we do not wish to attribute an event to the person who brought it about, in any one of a number of recognized in-

19. Compare Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701, 752 (1937).

20. For a detailed discussion of *act*, in general accordance with the views here expressed see Hall, *op. cit. supra* note 16 at 252-78. Compare Perkins, *Criminal Law* 474-475 (1957), with references to the leading literature. See also Williams, *op. cit. supra* note 16, c. 1 (1953).

21. The reference is, in any event, to the mind governed by *reason*, which has been defined as "(1) the power to abstract ideas from experience, (2) to relate ideas in propositions, (3) to employ those propositions in syllogisms and (4) to distinguish between the true and the false in the realm of knowledge." Wechsler and Michael, *op. cit. supra* note 19, at 1273 n. 32. Wechsler and Michael add to these criteria (of what we may call the power to make decisions) "(5) the capacity to distinguish good and evil in the realm of action and (6) to command the will *i.e.* to act in accordance with such discriminations." *Ibid.* I would rather regard the latter two elements as unnecessary for the power to make decisions, but as necessary for the power to make moral decisions. This interpretation, of course, does not help us in ascertaining the interaction of passions ("pattern of . . . sensual desires"), "habitual" or "sporadic," and "reason".

stances.²² The Model Penal Code of the American Law Institute operates with this defeasible concept of an act by providing:

The following are not voluntary acts within the meaning of this section:

- (a) a reflex or convulsion;
- (b) a bodily movement during unconsciousness [coma?] or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.²³

None of these various ways of defining the concept act can solve the difficulty inherent in the mental process which brings about the perceptible bodily movement. In the first place, we do not know enough about what is going on in the subconscious mind, especially as to how matter stored in the unconscious mind affects, influences and overrides orders and decisions emanating from the subconscious. Modern behaviorists are inclined to exaggerate the part of the unconscious, where earlier scientists exaggerated the part of the subconscious. But it is unquestionably true, as Robert H. Gault wrote, that "it is a fair inference that criminal behavior—like the behavior of men and women in the ordinary course of the day's work—is not *simply* a product of innate instincts or dispositions or reflexes that work as faithfully as a wound clock runs down."²⁴

For purposes of practical dealings with human beings, especially in the administration of criminal law, we have to draw certain more or less arbitrary lines. The choice is dictated not only in a fairly reasonable accord with our understanding of the human psyche, but

22. Hart, *The Ascription of Responsibility and Right*, 49 Proc. Arist. Soc. 171 (1949). But by treating the concept of act, or action, as an ascriptive, rather than descriptive, term, Hart comes close to making the mistake which I am trying to avoid here, namely of making the mental ingredient of the concept act itself the criterion not only of a legally relevant attribution, but ultimately also of criminal liability.

23. Model Penal Code, § 2.01, comments at 119-123 (Tent. Draft No. 4, 1955). I am particularly troubled with "habitual effort or determination" as mental process for conduct. But apart from that, what I said about the danger of Hart's approach applies here with equal vigor. Subs. (9) of sec. 2.03 provides that knowledge of illegality is not an element of crime. *Id.* at § 2.03(9). (This provision was accepted by the ALI without any protest whatsoever!) Since all the culpability requirements of section 2.02 encompass only the definitional elements of an offense (*id.* at * 2.02(2)), the element of unlawfulness excepted, we are left with a mens rea concept which makes the mental ingredient of the act concept the criterion not only of attribution but also of liability, *i.e.*, culpability, in many cases, especially those of regulatory offenses.

24. Gault, *Criminology* 61 (1932).

also by social policy considerations. Therefore, while being thrown into a bed of city owned chrysanthemums is not an "act" by any standard, because in such a case quite clearly the brain has given no direction to the body, when it comes to events caused by children or insane persons, the choice must be somewhat arbitrary. Nobody would say of the kicking and screaming of a newly born infant that these events are "acts." But somewhere between birth and manhood, and probably at a very early time, we must conceive of events brought about by the human being as acts. Is it not surprising to note that the common law of crimes has not drawn such a line at all? It satisfies itself with a line, drawn at age seven, which marks the beginning of the power to act morally as distinguished from the power to *act* rationally. The former power, because of its dependence on moral education and habit forming, develops relatively late in the life of the child. But in any event, in limiting the concept of the power to act morally the legal rule on infancy necessarily delimits also the concept of the power to *act*, since the former is necessarily included in the latter.²⁵ Nobody would question that events brought about by a youngster of six years and eleven months may not be acts. But for purposes of the criminal law they are not relevant acts. It is similar in the case of the insane, except that here the law deals with both the power to make a rational decision and the power to make a moral decision in the alternative. We have adopted an arbitrary standard, that for instance of the man who is mentally so deficient that he does not know the nature and quality of his act, by reason of disease of the mind (power to make a rational decision), or, that, for a like reason of disease of the mind, he did not know that what he did was wrong (power to make a moral decision).²⁶ We then say that anybody who does not meet this standard is incapable of performing what we wish to regard as an act. Henceforth we are talking, thus, about acts in a legally relevant sense, because we have seen that the complexity of the subject forced us to define an act in a more or less arbitrary manner and for purposes of a social policy. This much must be remembered, in the sphere of legally relevant acts we mean by "act" always a psycho-physical event in which a perceptible effect has been caused by conscious interaction of the mind and the body, *i.e.*, a mental process — frequently and popularly referred to as intention or voluntariness—and a physical movement.

25. Compare Wechsler and Michael, *op. cit. supra* note 19, 1261 at 1287-88; Perkins, *op. cit. supra* note 20, at 731. The trend toward postponing the line is noteworthy.

26. M'Naghten's Case 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843). Compare, Hall, *op. cit. supra* note 16, at 499 with text at note 21, *supra*.

B. Confusion of mens rea and intent.

We began with an examination of the assertion that every crime is composed of an act and intent, and we are now left with the conclusion that intent is really part of the act. Is it not inconceivable that the text writers were unaware of the fact that intent is part of the act, or did they mean something separate and distinct when they talked about intent as a requirement for crime in addition to mental process and physical movement? Hundreds, if not thousands, of cases decided in our courts over the last hundred years raise some doubt! We may pick almost any one at random to investigate the point. *United States v. Gris*,²⁷ taken, at the time of writing from one of the latest advance sheets, is as good an example as any. The defendant was charged with having "wilfully and knowingly" tapped a telephone wire, in violation of federal law. There was no doubt that the various physical movements which constituted the tapping of the wire were accompanied and preceded by a mental process, a consideration to engage in these physical movements. These movements, thus, were willed and the defendant was conscious or aware of the willed movement, "he knew." Judge Medina, therefore, concluded that "he knew exactly what he was doing; and what he did was a violation of the Federal Communications Act. He intended to do what he did, and that is sufficient."²⁸ Well then, if the physical movement with its creative and accompanying mental process is all that is required for criminal liability, it would seem that the phrase "every crime consists of act and intent" means no more than that every outlawed act, consisting of mental process and physical movement, is a crime without more.²⁹ But at this point we must harbor suspicion because, if this statement is true, would it not follow that *D* who aimed at a deer, but, hitting a stone from which the bullet was reflected, killed *V* fifty yards away, is guilty of murder? There is then a strong indication that something more than a mere act is required, something which could perhaps be rightly ignored in the *Gris* case, but which should not be ignored in homicide or perhaps in all common law offenses, especially of a grave nature. And that is true, because what is really meant when courts and writers talk about act and intent of orthodox crimes is, that a mens rea is required in addition to an act. Bishop expressed

27. 247 F.2d 860 (2d Cir. 1957). But see the commendable decision in *Heikkinen v. United State*, 355 U.S. 273 (1958).

28. 247 F.2d. at 864.

29. Perhaps with the understanding that the legislature may impose a special requirement of proof that a particularly blameworthy attitude has been evidenced. This, indeed, is a modern trend in thinking about these matters. See Mueller, *Mens Rea and the Law Without It*, 58 W. Va. L. Rev. 34, 67 (1955).

This is a most helpful chart and we may well employ it as a starting point for further inquiry. On his chart Robinson makes it immediately clear that what is commonly called the "act" is really composed of a mental process, which he rather awkwardly called "mental self-direction," and its outwardly visible counterpart, the "physical movement." This psycho-physical phenomenon "act" is then contrasted with what he calls the "criminal intent." This scheme is correct, but the method is somewhat inaccurate. To call this mental element of crime merely "criminal intent" renders it subject to being confused with the "mental self-direction" which is also frequently and popularly referred to as "intent." Merely to add the word criminal to the word intent (in the sense of mental elements of crime) will not do because it could be argued that it is criminal only because the law happened to call it such, which still leaves it subject to being confused with the "mental self-direction." Robinson should have called the mental element of crime by its commonly accepted name, "mens rea," not only because that saves it from being confused with his "mental self-direction," but also because it is more inclusive, covering such frames of mind as criminal recklessness, which the word "intent" does not seem to cover.

In accordance with accepted standards, Robinson should then have called "the act" *actus reus* (evil act), not only because it is the counterpart of *mens rea* (evil mind), but also because this makes it quite clear that we are not concerned with just any act, but with a legally relevant act. *Actus reus* connotes an outlawed act which fits a penal norm and is presumptively the product of an evil mind, according to the common sense principle—subject to rebuttal—that everybody is presumed to have intended what he did.

Next, rather than to call the psychic ingredient "mental self-direction," I would call it "mental process." For its components Robinson used descriptive terminology.³² This can well be done. But if so, we should make it clear what we mean by these terms. Perception is the sensual receiving of impressions through the conscious mind, and sent for storage to the unconscious mind, but also used for immediate decision within the subconscious mind. Each decision is, of course, also influenced by instincts and memories which constantly flow from the unconscious mind to the subconscious mind. This is the thought and execution process. But all that is necessary for purposes of determining whether or not an act has been constituted is to say, with all the cautions expressed before,

32. Robinson probably relied on Salmond, *Jurisprudence* 383 (8th ed. 1930); see Perkins, *op. cit. supra* note 20, at 471-75.

that the outward physical movement must be the product of what by common community standards is regarded as a rational mind, and that, ordinarily, the mind accompanied the physical movement from beginning to end.³³ Thus, it is perhaps simpler to substitute terms of a different descriptive nature for Robinson's terms and to say that the mental process necessary for an act has two aspects, that of creativeness and that of duration.

The physical movement need not be broken down into further components, and all Robinson wished to indicate by the terms "origin" and circumstances," I suppose, is that a physical movement does not happen in a vacuum, and can be judged only under consideration of its environmental conditions.³⁴ The bending of a forefinger can be observed as an act, but it would not interest the lawyer very much by itself. It becomes a legally relevant act only when the bending of the forefinger occurs in a certain environment, *i.e.*, when the forefinger touches the trigger of a gun which in turn causes a shell to explode, a bullet to be ejected from the gun's barrel, etc.³⁵ Here is the fluent boundary between Robinson's concept of "circumstances and consequences." These consequences have been subjected to legal rules of causation, again rules of practical choice. Through these rules of causation we seek to limit the concept of an act to those consequences which can be deemed to have been con-

33. The latter aspect, which I want to call duration, is subject to case law rules and exceptions. This may be illustrated by the following example from the Model Penal Code § 2.01 comments at 120 (Tent. Draft No. 4, 1955):

If the driver of an automobile loses consciousness with the result that he runs over a pedestrian, none of the movements or omissions that accompany or follow this loss of consciousness may in themselves give rise to liability. But a prior voluntary act, such as the act of driving, or a prior omission, such as failing to stop as he felt illness approaching, may, under given circumstances, be regarded as sufficiently negligent for liability to be imposed. In that event, however, liability is based on the entire course of conduct, including the specific conduct that resulted in the injury.

In this example the mental process resulted in the creation of the legislatively specified envisaged harm highly likely, or perhaps even inevitable. It does not matter, therefore, that at the precise moment of impact the offender's mental process was no longer operative.

34. Williams, *op. cit. supra* note 16 at 17-19. But *quaere* whether Williams does not go too far in suggesting that "Actus reus includes... also the absence of any ground of justification or excuse..." *Id.* at 19.

35. Of environmental conditions there are those which are necessarily inherent in the definition of the act, as made legally relevant by the law giver, *e.g.*, the fact that the forefinger is in relation to the trigger of the gun, etc., and those which the law giver imposes specifically. The latter may be immediately perceptible by the senses, or subject to easy ascertainment, as in the case of wearing an official uniform or emblem to which the offender is not entitled, or else, they may not be immediately perceptible by the senses, though presupposed as knowledge contained in the store house of knowledge (the unconscious), from which they are readily producible (to the subconscious) and thus become part of the mental process. As an example, we may think of the condition "war-time" as one of the actus reus elements in one form of espionage.

sidered in the mental process, though we must at once admit that, since our knowledge of the mental process is too limited, the approximation between mental process and consequences is rather rough. Physical movement, then, is limited by environment and rules of causation.

But it is now necessary to mention a further limitation of our interest in the physical movement part of the act, equally important as the limitation of causation. Physical movement interests us only insofar as a state of affairs has been brought about which coincides with the legal norm, or, differently stated, the effect of the physical movement must be a state of affairs which is precisely that which the law has specified as harmful. The act of bending the forefinger, shooting, killing, or however narrow or wide one wishes to take the concept of act—subject to causation—interests us only insofar as its effect is identical with a state of affairs specified in a penal form. It is this which we call harm. It may be a physical or immediate harm, perceptible by all, or it may be a mere state of danger which has been created. But in any event, the harm is the end point of human activity, as far as the penal law is concerned and we need not show any interest beyond it.³⁶

So much about *actus reus*,³⁷ and now to Robinson's concept of "criminal intent" which we already decided to call "*mens rea*" so as to properly accommodate negligence etc., and to prevent its confusion with the mental process part of the act. There has crept into our thinking the idea that there is no singular concept of *mens rea* but that, since every crime has a different *mens rea* requirement, one should talk of *mentes reae* rather than *mens rea*. This is a misconception and it is false to conclude, as some do,³⁸ that there is no unifying *mens rea* concept. Just as all cars have different wheels, little cars little wheels and big cars big wheels, and we are justified in referring to them collectively under the unifying concept wheels, so all crimes have a different *mens rea* and yet the concept of *mens rea* must be regarded as a unifying concept of various possible frames of mind.

36. For a detailed and excellent discussion of the theory of harm see Hall, *op. cit. supra* note 16, at 13-18. Williams does not include the state of danger into the harm concept. Williams, *op. cit. supra* note 16, at 17. He fails to appreciate that "mischievous tendencies" are, by their very existence, harmful to society. Thus, "mischievous tendencies," when strong enough to be prohibited by the legislature, are harmful.

37. Robinson's graph shows that *actus reus* and *mens rea* are joined by an "and;" indicative of the requirement of chronological concurrence of the two, on which I do not propose to elaborate in this context.

38. *Regina v. Tolson*, 23 Q.B. 168 (1889); Sayre, *The Present Signification of Mens Rea in Criminal Law*, in *Harvard Legal Essays* 399, 402-03 (1934).

D. *The forms of mens rea.*

This concept appears in a number of different forms, which have not been commonly recognized. Rather, superficial examination has led to the classification of mens rea into two basic kinds, which Robinson accepted, the *specific intent* and the *general, non-specific intent*. This is obviously a very crude method of classification, as a glance at Robinson's specific instances behind those terms will show. We cannot detect any legally relevant criteria, especially none which the courts have followed, distinguishing one group from the other. Certainly, such words as "intentionally" cannot even in common parlance be regarded as specific in any respect, particularly so since judges constantly take them for no more than the mental process part of an act, which is, of course, a completely false interpretation. Moreover, even the superficial observer will wonder how such terms as "maliciously" and "recklessly" can be placed on the same plane. A particular incongruity is the inclusion of "without regard to the safety of others," a form of mens rea clearly below any intention to produce the harm, into the category of specific intent. And lastly, if the non-specific intent may be specially indicated in the statutes (*e.g.*, by the word "unlawfully") what makes it so non-specific? Thus, the partition of mens rea into specific intent and general intent is both unworkable and meaningless.

Indeed a much simpler way suggests itself for classifying the various appearances of the complex concept of mens rea into workable subdivisions. When we study the mens rea requirements of various common law offenses, we perceive at once that mens rea appears in various forms:

1. Commensurate mens rea.

The most easily recognizable, and perhaps even commonest, form is that of an evil intent to do precisely that which constitutes the prohibited harm. As an example we may take what in many states has become the standard form of homicide, murder in the second degree,³⁹ which is the killing of a human being (*actus reus*) with the completely commensurate mens rea form, the intention to

39. Homicide in the second degree is usually presumed from the act of killing a human being. The prosecutor will have to prove additional mens rea requirements to raise the crime to murder in the first degree, the defendant can negate the presumption of the existence of second degree murder mens rea by showing that he had less mens rea (or none at all) than that required for murder in the second degree. *E.g.*, W. Va. Code Ann. § 5916 (1955), and comments at p. 2722.

kill a human being.⁴⁰ Larceny may serve us as another example: it is the taking and carrying away of the goods of another (*actus reus*) with precisely the intention to do so.⁴¹ We can say in these cases that the *mens rea* is commensurate with the *actus reus*, and for want of a better term, we can call this form of *mens rea* the *commensurate mens rea*.

Excursus: *mens rea* and ethical evaluation. The substance of *mens rea*.

At this point I am likely to be charged with incongruity and the charge may appear so severe that, before proceeding to the discussion of the remaining forms of *mens rea*, an explanation is called for.

Why is it necessary to speak of a *mens rea*, in the form of intention (*e.g.*, to kill), if we decided that the mental process which is part of the act, *actus reus*, already amounts to, or includes, something of the same nature, an order to the extremities to do that which amounts to an accomplishment of killing? It will be recalled that our mental process was completely valueless on the ethical scale. We made no statement as to whether or not the mental process was good or bad in itself, whether we would attribute liability or not. We say "he did," because he decided to do and knew what he was doing. But the concept of *mens rea* is completely different from this ethically indifferent and valueless mental process and this is commonly not recognized.⁴²

The term *mens rea* which the common law has employed at least since the days of Coke,⁴³ is Latin and means evil mind. It has a decidedly moral or ethical sound, as in French law, where it is

40. It will be noticed that I used the more modern phrase *intention to kill*, rather than the well-known common law phrase *malice aforethought*. Since *aforethought* has been held over and over again to be without any significance, we are left, even at common law, with the term *malice*. But the cases show that *malice* has a connotation which is no different than that of an *intention to kill*, allowing for certain substitute frames of mind which, from experience and probability considerations, and for purposes of utility and social need, are being deemed equivalent to an actual intention to kill. Considerations of this nature have been discussed in Wechsler and Michael, *op. cit. supra* note 16, at 733-51.

41. In jurisdictions where the element of *lucri causa* is required (there may well be none left), larceny would no longer be in the same category, but, rather, would move to our second category.

42. Perkins represents the more popular view which fails to make a clear distinction between mental process and *mens rea*. Perkins, *op. cit. supra* note 20, at 654-61 *passim*. By defining *mens rea* as "either *intention* to do the act or bring about the consequence or (in some crimes) *recklessness* as to that consequence," and failure to define the substance of *mens rea*, Glanville Williams reaches the same faulty conclusion as Perkins, although, since he differentiates clearly between mental element in act and *mens rea*, by a different route than Perkins. Williams, *op. cit. supra* note 16, at 29.

43. See Note, *The Doctrine of Mens Rea*, 13 *Crim. L. Mag.* 831 (1891).

called *l'element morale*, and in German law, where the ethically flavorless form of *Vorsatz* (intention) and the form of *Fahrlässigkeit* (negligence)—which latter, of course, imports a notion of blame ipso facto—have a common denominator of ethical implication, *Schuld* (guilt). It would appear that by employing an ethico-legal term as a common denominator for the various possible forms of mental elements in crime, our law has committed itself to an ethical concept of crime.⁴⁴ That appears to be true at first glance—though the complete veracity of this conclusion is precisely the issue of the second part of this paper—when we are asked to name, without hesitation, a common law offense which is or was not part of the moral code of the time of its validity.⁴⁵ We are embarrassed by such a question, since we cannot think of instances of this nature. That this coincidence of the moral, ethical, and legal holds no longer true today is commonly known, though the reasons therefore are generally not so well known. In any event, at common law there was and is an ethico-legal concept of *mens rea*, because every prohibited act was also known to be evil. Thus, an intention to do this act amounted to an evil intention, a *mens rea*. To be quite sure, the common law itself did not particularly care whether or not people acted morally or not—though there were important exceptions, especially among the colonial New England Puritans—but it used the test of morals, mores or conventions, as criteria for imposing legal blame since the prohibitions were much better known in their moral than in their legal garb. (It must be noted, though, that from this sphere of the immoral only the most flagrant instances were selected for treatment by criminal law.) The maxim *error juris criminalis nocet*⁴⁶ could do no harm at such a time, because what was legally punished was also morally unacceptable and nothing which was morally acceptable was legally punished. Only

44. See I Hale, *Pleas of the Crown* 14-15 (1736); I Hawkins, *Pleas of the Crown* 1 (6th ed. 1787); Coke, *Third Institutes* 107 (1797); and see my discussion, *supra* note 31, at 36-38.

45. Crimes grounded in the culture or mores of a people are not to be confused with the imaginary concept of *natural crimes*. There is no sufficient evidence indicative of any such concept as that of *natural crimes*, although it may be regarded as established that all human societies have some rules in the nature of criminal law on the regulation of external security (treason) and sexual conduct. See Mueller, *Tort, Crime and the Primitive*, 46 J. Crim. L., C. & P.S. 303 *passim* (1955). Here I am referring to crimes which are part of the moral code of a given people at a given time. Jerome Hall calls these *actual crimes*, "which we know are integrated in the mores; they have some appreciable degree of public acceptance;" as contrasted with what he calls *formal crimes*, which are not so accepted or integrated. The latter are, however, *potential actual crimes*, because they may become part of the moral code. See Hall, *op. cit. supra* note 16, at 552-53.

46. Error of law is injurious, *e.g.*, it does not excuse.

error facti could have any relevance at such a time. It could truly be called the test of mens rea.⁴⁷ And herein lies the crucial test for the correctness of my assertion that the mental process is something entirely distinct from mens rea: an evil intention was imputed to the actor because he was deemed to have desired that which he was irrebuttably presumed to know—and perhaps, without exception truly did know—to be an evil act. But he could exculpate himself by proving that his mental process was pure, *i.e.*, that what had been attributed to him was his act, with mental process (intention) and physical movement, but that he did lack an evil mind because he labored under a mistake of fact which did not permit him to recognize the act as evil. Clearly, in such a case there is no mens rea, although to say that there is no act would be quite absurd. It is very regrettable, as I pointed out elsewhere,⁴⁸ that today's penal laws no longer represent, and stem from, the mores of the community. But under such circumstances it was easy to misinterpret the old misleading slogan of act and intent, and to equate the mens rea with the mental process part of the act—which constitutes a de-ethiciza-

47. It is not part of this paper to discuss the "defenses" which exclude the act, though a brief mention should be made of the most important. Infancy and insanity have been mentioned already. It is noteworthy that insanity may sometimes (*e.g.*, under the right-wrong formulation or in cases of "partial insanity", *United States v. Parelus*, 83 F. Supp. 617 (D. Hawaii 1949), and intoxication does (though not quite correctly) only, operate in the sphere of mens rea. Hall, *op. cit. supra* note 16, at 427-76, with re-examination and reform proposals. *Id.*, at 466-76. In these instances the law merely deems the perpetrator incapable of forming a particular component or element of mens rea, regarding the act itself as still a rational product of the defendant's mental process. Superior force is another instance in which the act may be excluded. There is some doubt about the classification of duress and coercion. I deem such defenses to go to the mens rea, rather than the actus reus, because the defendant's physical movements in such cases are the result of a rational mental process. There has been choice, though the alternative to the act committed made the choice socially acceptable. Therefore, we cannot talk of an *evil* mind.

Williams believes that "at the present day the exemption from responsibility, such as it is, given by the 'act' doctrine could, in respect of the requirement of will, just as well be put on the ground of mens rea." Williams, *op. cit. supra* not 16, at 15. It is true that a driver who unlawfully blocks a roadway because blocked traffic prevents him from moving his vehicle either forward or backward could just as well be excused by reason of not having a mens rea as for want of an act. See *Commonwealth v. Brooks*, 99 Mass. 434 (1868). Similar situations can be easily imagined. But such an intermixture of two basically different concepts might have detrimental consequences, *e.g.*, on the insanity issue, on corresponding civil damage actions, etc., but especially in cases of clear statutory absolute criminal liability. Where the criminal statute is one of absolute liability, the mens rea requirement has been dispensed with. To say that not even an act (*i.e.*, the mental process part thereof) is required, would be the acme of absurdity. Such cases, however, are not unheard of precisely for the reason that the entire mental element of crime has been treated as a unity, under mens rea, in flagrant disregard of the fact that the mental process aspect of an act is something entirely distinct from a mens rea.

48. See Mueller, *op. cit. supra* note 29.

tion of the mens rea concept—and to arrive at the rule, common today, that the defendant need not know that what he did is wrong, as long as he knew what he did. My point is that since moral education no longer serves us as a guide as to what is prohibited, a knowledge or awareness of unlawfulness (or at least a violation of a duty to keep informed about a special segment of legislation) ought to be recognized as a necessary mens rea requirement today. Indeed the "rea" of the mens rea requirement admits of no other choice than this: that for modern offenses which are not grounded in the community's moral consciousness the modern counterpart of the old (ethically-morally) evil mind, namely the modern concept of an awareness of unlawfulness of the act, must be introduced,⁴⁹ and it makes little or no difference whether the offense is one of commission or of omission.

Now we can sum up: It is this awareness of evil, *the sense of doing something which one ought not*, which constitutes the crux or substance of mens rea at common law. Similarly, in the case of statutory additions to the common law, it may be the mere awareness of unlawfulness of the particular act,⁵⁰ which constitutes the mens rea, though as legal prohibitions may, and frequently do, become part of the moral-cultural code of the community, it may again become the "sense of doing something which one ought not,"—rather than the awareness of unlawfulness—which becomes the substance of mens rea for a particular offense.

49. That, incidentally, would lead to the salutary rule that excusable error of law as to these offenses—usually of a regulatory nature—would serve as a defense: since the existence of the legal prohibition, expressed in the particular statute, is itself a fact, *error facti excusat* applies. (The standard of the excusable could be the duty to keep informed about the legal regulation governing conduct in which the defendant is peculiarly engaged. For example, while it is not a rule of our moral code that butter must contain a certain percentage of fat, it is a known rule of our moral code that government regulates the production of butter. Thus, the dairy man must keep informed about laws and regulations governing the manufacture of butter. It is not excusable if he fails to keep posted about such laws.)

As to culturally accepted offenses there is little danger in retaining *error juris nocet*, because it would be idle to permit a defendant to contend that he did not know about the unlawfulness of murder or larceny. Though difficulties will be encountered in cases of erroneous belief in a right to use force against unlawful attacks and in similar situations. Existing law certainly has not properly resolved these difficult questions, and the problem can hardly be solved in this footnote treatment of matter marginal to our major topic.

A decision on whether a particular offense belongs to the cultural heritage of the people or has been integrated in the mores, on the one hand, or whether it is merely a regulatory offense, inoffensive absent statute, may be regarded as a decision of a question of fact.

50. Or perhaps only the failure to live up to a duty to know of the prohibition, as suggested in note 49, *supra*. Such a reckless or negligent disregard of a socio-legal duty could well be termed *negligence* (or *recklessness*) of law.

Mens rea, then, is not the mere psychic relation between act and actor, it is, rather, the ethico-legal *negative* value of the deed (appearing in various legally prescribed forms), *i.e.*, it is a *community value of which the perpetrator at the time of the deed knows the existence and that it will materialize when the deed becomes known*.⁵¹

As mentioned repeatedly, it is a well known fact that in the sphere of regulatory offenses the mens rea requirement has been frequently dispensed with, not only by confounding mens rea with the mental process aspect of act, as above described, but also by express legislative mandate, or by implication which prompted some courts so to conclude. There is, of course, nothing which could prevent legislatures from throwing the common law mens rea requirement out of the window,⁵² thus creating absolute liability offenses, just as there is nothing which would prevent a despot from disregarding even more, namely the maxim *nullum crimen sine lege*.⁵³ Such decisions are in the nature of policy decisions dictated by belief in greater effectiveness of such laws, or they may rest on devious political considerations. That such considerations have led to ridiculous results, likely to lessen effectiveness of the law, and, what is worse, that they are offensive ethically, I have tried to point out before.⁵⁴

We are now in a position to return to our consideration of the forms of mens rea. It will be remembered that we stopped after discussion of the commensurate form, in which the mens rea rests precisely on the same level as the actus reus.

2. Additional mens rea.

Observation of decided cases shows us that in a number of instances the law demands more than an evil intention to do precisely that which is, and is known to be, the harm. In such cases the law wishes to mete out a particularly severe punishment for a particularly evil thought or disposition. It does not concern us at the

51. See my discussion in *To the Memory of Ernst Seelig*, 47 J. Crim. L., C. & P.S. 539, 543 (1957), indicating where I have borrowed from Seelig, although Seelig's theory is not completely acceptable.

52. At least so the courts have said in holding that the due process clause does not protect against criminal conviction for wrong-doing of which the defendant was unaware. *E.g.*, see *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910), and *Lambert v. California*, by considerably narrowing the scope of the *Shevlin-Carpenter Co.* case constitutes the first major improvement.

53. The German (1935) and Russian (1926) analogy provisions are well-known examples. See Hall, *op. cit. supra* note 16, at 41-45, n. 55.

54. Mueller, *op. cit. supra* note 29.

present whether or not the law is justified in doing so. Suffice it to say that it does. Thus, murder in the first degree deals with the same actus reus as murder in the second degree, but the punishment is higher for an established particularly evil mind of the defendant, a mind which encompasses more than the intention to kill, namely premeditation and deliberation,⁵⁵ elements which have no counterpart in the actus reus. This is not to say that we do not rely on evidence of the defendant's conduct, but here we do so simply because we cannot look into the defendant's mind. The actus reus in the sense of prohibited harm done, does not differ in case of murder I from that in the case of murder II. And so it is in burglary, where we require a state of mind in addition to the basic mens rea for the basic actus reus, breaking and entering; we require the intention to engage in felonious activity or theft in the building broken and entered.⁵⁶

This form of mens rea, therefore, can be easily recognized in that it demands an evil mind in *addition* to that required for the basic evil act which is, and is known to be, wrong. Indeed, this additional mens rea requirement is ordinarily so pronounced that we tend to forget, occasionally, that there is also a *basic mens rea* requirement in such cases. Burglary is a good example. The prosecutor ordinarily introduces evidence of the actus reus of breaking and entering, omitting evidence of the intention to break and enter, and thereafter he will prove an intention to commit a felony or larceny in the building broken and entered; and the defendant usually fails to protest about the failure to prove the intention to break and enter—even in cases where the act of breaking and entering does not necessarily speak for itself—because everybody concerned concentrates on the proof of the crucial requirement of an intention to engage in felony or larceny in the building. It is for

55. Cf. Wechsler and Michael, *supra* note 19, 1261 at 1282-84, to the effect—rightly and considered on the basis of modern psychological insight—“that deliberation has no independent significance in relation to character and that the importance usually accorded it properly belongs to other factors which are its concomitants such, for example, as lapse of time, or to still other factors which it evidences, such as knowledge and intent.” This is the synopsis of forceful argument for the abolition of *premeditation* as an additional mens rea form. *De lege ferenda*, substitute criteria for segregating particularly vicious and considered killings may be the ends and means of the perpetrator. *Id.* at 1277-80. My analysis of mens rea, however teleological, is *de lege lata* and attempts to portray, as accurately as that is possible in a generalization, the existing law. I must, therefore, recognize that deliberation is being employed as an indication of additional mens rea to distinguish between murder and especially evil murder, however crude the criterion of distinction employed by the law may be.

56. In jurisdictions where larceny requires the mens rea element of *lucri causa*, larceny also falls into this category.

this reason of special emphasis on the additional mens rea requirement, above and beyond the ordinary and commensurate mens rea requirement, that we are justified in calling this form in which mens rea appears: *additional mens rea*. But we must not forget that we are dealing here with a mens rea superimposed on an ordinary mens rea for an ordinary actus reus. We are not dealing with the case where it is only a particular mens rea which makes an otherwise inoffensive act criminal.⁵⁷

3. Adequate mens rea.

We can next observe that the criminal law employs a form of mens rea which quite clearly does not measure up to the commensurate form which we met first. In such cases the actus reus may be the same as that of a more severe offense, requiring a more severe mens rea. But in these cases the actus reus has been brought about by a mind, though evil or blame-worthy, which did not intend to do that which resulted. Recklessness, negligence, heedlessness, disregard for the safety of others, are instances of this sort, and legislatures have no difficulty thinking of new terminology.⁵⁸

In the case of conscious creation of risk, *e.g.*, certainly in most cases of recklessness, the "evil" or "blameworthy" character of the frame of mind is self-evident. But it may be thought that the defendant who is negligent without being conscious thereof, *i.e.*, by an objective standard, lacks an evil mind. The answer is simple enough: in these cases the mens rea may be regarded as of an omissive nature. It is precisely the attitude of self-centered thoughtlessness and disregard for the rights of others *despite the capacity and opportunity* to realize and respect these rights which constitutes this form of mens rea. Thus, while the difference between adequate mens rea and the three other forms of mens rea is one of form, it is also one of intensity of concentration. But the *nature* of mens rea, the value character, is the same for all forms. This is not to deny that our law does use an objective standard—the reasonable man under the circumstances—in order to ascertain whether the defendant's mind was sufficiently blameworthy. But in the case of negligence, as well as in the instances of result-qualification,⁵⁹

57. *Infra*, text at note 61.

58. The dividing line between intention (which may take the form of not quite wishing for the result, but being afraid that fairly certainly it is bound to happen) and a gambler's reckless attitude about the outcome is an arbitrary one and subject to different policy considerations in different societies. On the limit between intention and recklessness in general see Weichsler and Michael, *op. cit. supra* note 19, at 709.

59. *Infra*, text at note 71.

the law operates with an objective standard which, based on experience, closely approximates that under which the defendant must have operated in fact. In my opinion, therefore, we are here confronted with the use of a schematic and crude way of establishing the mens rea, but one which nevertheless evidences the law's concern for the mental attitude of the defendant. Thus, while a completely subjective standard might do better justice in individual cases, it might be incomparably more difficult of application than the "objective" way of establishing *adequate mens rea* in the individual. "Such a theory of negligence," as Moreland said, "is founded on blame-worthiness no less than a subjective one. The difference lies in the fact that the tests of blameworthiness are *external*. . . ."⁶⁰ But in any event, although not quite commensurate, this form of mens rea is sufficient or *adequate* to convince the trier of fact of its sufficiently evil nature in relation to the harm produced. We are, therefore, justified in calling this lower-than-standard frame of mind the *adequate mens rea form*.

4. Independent mens rea.

Lastly, there is a group of crimes which consist of acts ordinarily not at all criminal or even only unlawful, and added mens rea requirements which are of quite an independent nature. Here the act, again consisting of mental process and physical movement, is inoffensive in itself, for which reason its commission cannot be said to be accompanied by any mens rea at all. What makes the act unlawful is its recognized misuse for socially harmful purposes by persons with evil intentions of a particular sort. Thus, it is ordinarily quite inoffensive, in fact it may amount to an act of chivalry, if a gentleman gives a lady a ride in his automobile from state *A* to state *B* where she desires to travel. But if this gentleman does so with a sinister frame of mind, *i.e.*, "for the purpose of prostitution or debauchery, or for any other immoral purpose . . ."⁶¹ the act ceases to be lawful (and its perpetrator presumably ceases to be a gentleman), and it becomes a federal crime consisting of an act which

60. Moreland, *A Rationale of Criminal Negligence* 40 (1944). Moreland completes this sentence with a quotation from Holmes, *The Common Law* 50 (1881): "independent of the degree of evil in the particular person's motives or intentions." I do not regard this statement as acceptable. Self-centered concentration or mental pre-occupation which is so strong that it leads to the disregard of the interests of others is an evil frame of mind. Since this frame of mind leads to criminal liability only when it exists in a high degree of concentration, all indications are that our test works fairly well, despite its crudeness. Of course, beyond that, I am very much in favor of subjectivising the negligence test as far as administratively feasible.

61. 62 Stat. 812 (1948), 18 U.S.C. § 2421 (1952).

derives its evilness only from the fact that it is accompanied by an independent frame of mind, all as specified by statute. This form of mens rea may then properly be called the *independent mens rea*.

E. Principle of legality in relation to mens rea.

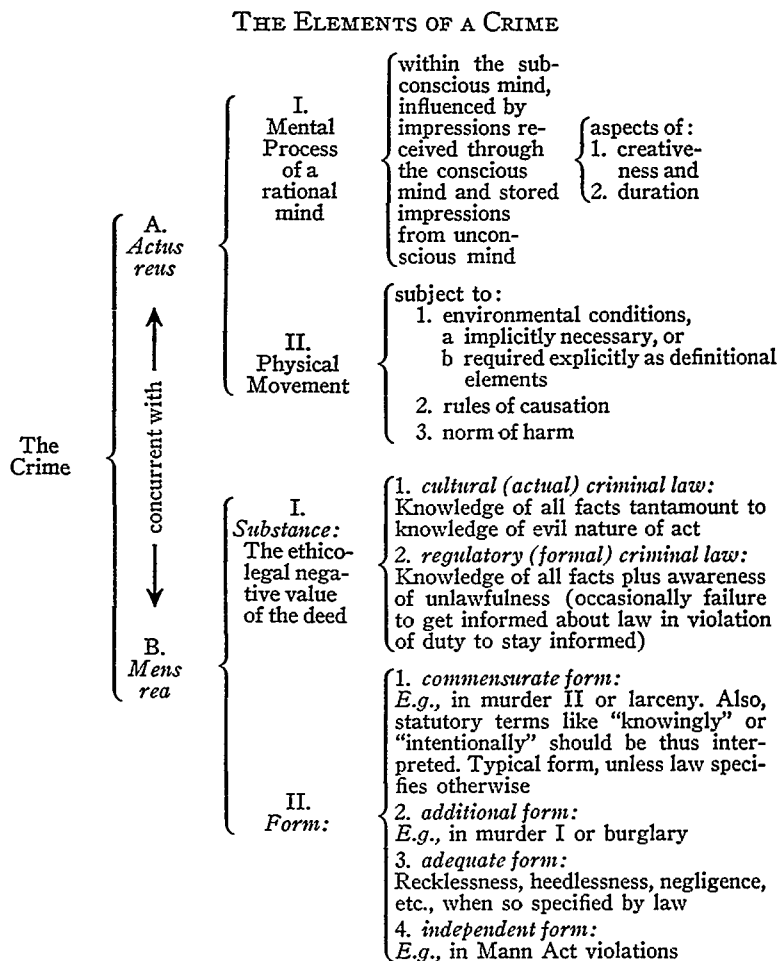
One final note is necessary before concluding the subject of the forms of mens rea. Ordinarily, the mens rea form which the legislature or the common law prescribes for a particular crime, must be established, and no different form will do.⁶² If the actual mens rea form is lower, smaller, less grave, than the one called for, we may be confronted with a lower degree of the same offense category, or with a lesser included offense, or with no offense at all. But more than that is required. It does not suffice to entertain just any undirected evil mind of the individual nature and the prescribed form, say intention or recklessness, but this evil mind, or mens rea, must ordinarily be directly related to the evil act, actus reus, charged. A subject matter concurrence is required which extends the mens rea to all elements of the actus reus.⁶³ Thus, on principle, in order to have murdered, the defendant must have entertained the mens rea form "intention to kill a human being." (Actus reus and mens rea are commensurate and concurrent.) And so, likewise on principle, a defendant who, while engaged in unlawfully shooting his neighbor's chicken, happens to kill his neighbor accidentally, should not be guilty of murder, since the mens rea he entertained did not happen to coincide with the actus reus of murder. He may be guilty of negligent homicide, depending on the legislative definition of this offense, but he should not be guilty of murder.⁶⁴

62. As a matter of constitutional law there can be no conviction of an offense higher than the one specified in the indictment, though conviction for a lesser included offense may be had.

63. *Definitional Elements*: In want of a better term the elements of an offense may be called *definitional elements*, since the offense is defined in these terms by law. Definitional elements may pertain to the actus reus, as in the text above, or to the mens rea. Indeed, mens rea itself, whether mentioned in the statute or not, is a definitional element by common law standards. But it must be emphasized again that modern courts and legislatures have frequently abolished the definitional element of mens rea for reasons of a completely misunderstood utilitarianism.

64. A great number of decisions, of course, hold cases of this nature to be murder, on various possible grounds, often on principles of the felony-murder rule. This rule and similar propositions rest on the ancient maxim of *versari in re illicita*, that he who engages in unlawful conduct is supposed to incur criminal liability for all consequences whatsoever. This principle is supposed to have a deterrent effect, though nobody has been able to prove that. We can readily see that the *versari* principle operates with some mighty big assumptions and may well rest on erroneous considerations which are probably of greater detriment than benefit to law enforcement, though this is not the place to prove it.

At this point it is proper to summarize what has been said. This can best be done, perhaps, by presenting a modified version of the Robinson chart which will take my criticism of Robinson's approach and my suggestions into consideration:



II. WHAT EXCEPTIONS TO THE COMMON LAW MENS REA

REQUIREMENT DID THE COMMON LAW ITSELF DEVELOP?⁶⁵

Having established a working concept of mens rea and having ascertained that it is an ethico-legal value concept, we can now proceed to test its validity. We shall do this by investigating all

65. On this part of the paper I had the benefit of the advice of Professor Herbert Wechsler, Columbia Law School, which is gratefully acknowledged.

alleged instances in which at common law mens rea was supposedly not a requirement for conviction. Should we find such instances of any material sort, there would be a strong temptation to conclude that mens rea, after all, is not an ethico-legal concept, but merely the mental process aspect of the act. Or at least, one could say that mens rea was (and is) not a universally required common law element of crime.

A survey of common law offenses makes it immediately apparent that any possible exception to the mens rea requirement may be complete or it may be only partial. It is complete when the law does not care at all about the mens rea of the offender and imposes liability for the act alone.⁶⁶ This may also take the form of subjecting the crucial element of the offense, *i.e.*, that by which the offense is recognizable as blameworthy, to an objective standard.⁶⁷ It is partial when the law is concerned about the requisite mens rea for a basic criminal act but imposes additional liability above and beyond the desired, intended, encompassed or encompassable,⁶⁸ foreseen or foreseeable,⁶⁹ harm; either by ignoring the defendant's attitude in this respect entirely, or by imposing an objective, rather than a subjective standard.⁷⁰ The partial exceptions may take either of two general forms. One partial exclusion of *mens rea* may pertain to a given result, as in the case of one version of the felony murder rule—where liability for murder is imposed although no more than the mens rea for a basic non-homicidal felony need be made out.⁷¹ Or it may refer to a single element of an offense which is criminal even absent this specific element, but which is a greater crime if the element is present, whether known to the offender or not. For example, *B* may be guilty of statutory fornication if he has extra-

66. A statutory example of this sort underlies the prosecution in the already discussed case of *United States v. Gris*, 247 F.2d 860 (2d cir. 1957). In such cases the court is not at all concerned with the defendant's actual awareness of wrongfulness. The statute prevents the court from making any inquiry of that sort. (Supposing, of course, that the statute has been properly interpreted as one meaning to impose absolute liability, which may well be doubted for the statute applied in *United States v. Gris*.)

67. See discussion of "objective standards" in the section on libel, *infra*, text at notes 80-94.

68. Depending on whether the commensurate or the adequate form of mens rea is required.

69. Depending on whether the commensurate or the adequate form of mens rea is required.

70. The latter is particularly applicable to the second exception, *infra*, but may also be found in the former. For collection and discussion of references see Wechsler and Michael, *op. cit. supra* note 19, at 709-11.

71. See reference in Mueller, *op. cit. supra* note 29, at 42-43. Full discussions at Wechsler and Michael, *op. cit. supra* note 19, at 709-17, 745; Moreland, *Law of Homicide* 42-54 (1952); Crum, *Causal Relations and the Felony Murder Rule*, 1952 Wash. U.L.Q. 191.

marital intercourse with a female, but he may be guilty of statutory rape, a much more severe offense, if, whether he knew it or not, the female "victim" was below a specified age. *B* had a mens rea covering a relatively small offense, but he is being convicted for an offense of a gravity and nature not completely encompassed by his mens rea. We may call these instances of complete or partial exceptions to the mens rea requirement forms of complete or partial absolute liability.

There is indeed one further possible form of absolute liability, namely those cases in which the penal law imposes a liability upon the mere happening of an event which is attributable (though not really imputable) to the defendant, *i.e.*, where not even an act has been committed. An example would be the already mentioned case of a defendant who, by strong hands, is thrown into a city-owned bed of chrysanthemums and who was to be charged with destruction of property or malicious mischief; or the case of an automobilist who "obstructs" traffic because he is stuck in a traffic jam. I am not aware of any strong claims to the effect that the common law practiced any absolute liability in either of the two latter forms, although the matter should perhaps be subjected to some scrutiny. But familiar examples suggest themselves in the first form of partial exclusion. The felony-murder and misdemeanor-manslaughter rules have been mentioned already and other examples could be uncovered. This, however, I must postpone for a future occasion. The issue of partially absolute liability is not pressing in terms of my immediate objective because a number of rationalizations may be made, all of which suggest that the principle of *versari in re illicita* on which this exception rests, offers a fair explanation along lines of the mens rea or guilt-principle. It is noteworthy that in these cases, the law will not impose a penalty on the actor unless he has evidenced at least some blameworthy frame of mind. Often-times it has not even been recognized that these cases are not totally in accord with the guilt-principle, as, indeed, one may interpret them as a crude way of doing a rough sort of justice by stereotyped standards, similar to those applied in establishing criminal negligence objectively. We meet this crude standard throughout our penal law. Suppose, for example, that a thief decides to steal, for whatever motive, a watch. In a crowded department store he sees a watch exhibited which he remembers having seen elsewhere marked at \$19.50. He steals the watch, is apprehended and tried for grand larceny of an object worth in excess of \$20.00 as, indeed, the price of this particular watch was \$21.50. The difference in liability

may be that between a maximum of incarceration in the county jail for one year, and imprisonment in the penitentiary for a maximum period of five years, though the difference in the objective quality of the harm must be measured in monetary terms of a paltry \$2.00. The objective quality which, according to our law, need not be encompassed by the defendant's *mens rea*, qualifies the intent. Many crimes are of this nature, but the law has long given up any attempt to measure *mens rea* with apothecaries' scales and no longer makes, or perhaps never did make, fine distinctions between result qualification and direct result.

Since, as indicated, in all these instances of partially absolute criminal liability the law can be credited with at least a semblance of conformity to a crude concept of blameworthiness, the concept of partially absolute liability does not interest us any further for purposes of this specific inquiry, which attempts to establish clear and material departures of the common law from the guilt-principle. At the same time we should keep in mind, however, that any attempt to bring our penal law in accord with the *mens rea* principle must ultimately tackle the task of detailed analysis of partially absolute liability as well.

This leaves us, for study, those cases in which the common law is supposed not to have bothered, or not to bother, about any requirement of *mens rea* whatsoever.

The most often cited instances of common law criminal liability without *mens rea* are said to lie in the law of libel and nuisances.⁷² While there is some contention that the common law of libel has operated with direct absolute liability, the more vehement assertion is that the common law, in the fields mentioned, disregards *mens rea* by providing for the liability of an entrepreneur for the unlawful acts of his agent. Thus, the proprietor of a printing or publishing establishment is said to be absolutely liable for the libels published in his establishment. The owner of a factory is said to be absolutely liable for the criminal nuisances caused by the acts of his employees within the scope of their employment, whether prohibited to act in the prescribed manner or not. Strictly speaking, these examples would constitute more than criminality without *mens rea*. Not only does the person against whom the law moves lack any *mens rea*, but he has not even committed the prescribed act. Such, indeed, would be a grave departure from the principles of the common law of crimes.

A few writers have found a third instance in which liability is based on such considerations: in the law of husband and wife. The

⁷². General references as to *loc.* of each assertion, *infra*, at notes 96, 140, 184.

husband, as the head of the household, is said to be criminally responsible for offenses committed by his wife in the common home. This form of liability is in the nature of vicarious liability, a form of liability otherwise known only in tort law. Strictly defined, vicarious liability restricts itself to holding liable an innocent party in lieu of the true perpetrator. As we shall see below, vicarious liability had acquired an additional meaning, namely the additional responsibility of an *innocent* party above and beyond the liability of the actor. Thus, vicarious liability is both supplanted and supplemented liability.⁷³

At this point it should give us a feeling of satisfaction to note that the pitiful nature of these alleged common law exceptions to the mens rea requirement tend to confirm our belief that common law mens rea is an ethico-legal concept of virtually universal nature. We shall look at these three spheres of penal law in order to ascertain the extent to which this belief in the existence of criminal liability without mens rea, at common law, is justified.

A. Criminal Libel

Common law libel has been defined as the malicious publication of durable defamation.⁷⁴ It is difficult to make any other generalization about the common law of criminal libel.⁷⁵ There never has been an abundance of cases in this field, and in recent years such cases have become exceedingly rare. With respect to direct commission of the offense⁷⁶ of libel, the rules are admitted by all writers to be similar to those which apply to the direct commission of other crimes and misdemeanors at common law. *Actus non facit reum nisi mens sit rea* is generally said to be applicable, though at least two propositions affect the firmness of mens rea in the case of libel. The required malice is understood to be no more than the absence of justification or excuse,⁷⁷ hence really the intention to publish a durable defamation. But the defendant may exculpate himself by showing that the statement he made is true and that he acted with

73. For a competent discussion of further theoretical aspects of vicarious criminal liability see Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689 (1930). For a discussion of vicarious criminal liability in the form of corporate criminal liability see Mueller, *op. cit. supra* note 31, appended bibliography at 48-49.

74. Perkins, *op. cit. supra* note 20, at 351.

75. For an excellent brief survey of current state law, as well as historical matter, see Mr. Justice Frankfurter's opinion in *Beauharnais v. Illinois*, 343 U.S. 250, n.5 at 254-57 (1952). Twenty American states follow the common law rule without material modification.

76. 4 Blackstone, Commentaries *151.

77. Perkins, *op. cit. supra* note 20, at 357-58.

good motives and for justifiable ends. This is a virtually universally accepted rule.⁷⁸ It follows that libel is the intentional publication of a durable and untrue defamation with bad motives and for unjustifiable ends, in which the untrue nature of the publication and the bad motives and unjustifiable ends are presumed. Such a reversal of proof of a mens rea requirement has been regarded as an inroad on the mens rea principle. Such it is not. It may be inconsistent with common law procedural standards, but by virtue of the fact that the presumption⁷⁹ may be rebutted, the mens rea is unaffected.

The other supposed inroad arises from the fear that objective, rather than subjective, standards are to be employed for determining the presence of definitional elements; for instance the guilt-exclusionary element of truth, which is usually applicable only where coupled with good motives and justifiable ends.⁸⁰ In the common law prior to American state legislation, as indeed in English criminal law today, the truth of the matter asserted was no defense.⁸¹ Thus, the common law offense of defamatory libel was one which had an independent mens rea, *i.e.*, only the evil intention made an otherwise unobnoxious act criminal. Where truth is no defense, the mens rea consists entirely of bad motives, and there can, then, be no danger that by disregarding a defendant's honest mistake as to the truth, an absolute liability may be imposed. But where, in American law, truth is a defense, the question arises whether the defendant's reasonable belief in the truth, after proper inquiry, will be tantamount to actual truth; in other words, whether *error facti excusat* is applicable. If not, it might be thought that we are confronted with an incident of absolute liability.

In the first place, it may not be quite clear at the trial whether or not the matter asserted is true. In this case the rule prevails that

78. *Id.* at 358.

79. May, in his text, expresses some surprise that even malice (intent to publish) is presumed against the defendant, citing, among others, *Rex v. Harvey*, 2 B. & C. 257, 107 Eng. Rep. 379 (K.B. 1823), *Smith v. State*, 32 Tex. 594 (1870)—but in this case *malice* was used in the sense of an intention to injure, *id.* at 597—and *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1825), adding: "There appears to be no objection to inferring malice but the distinction between an inference and a presumption should be insisted upon. See *Root v. King*, 7 Cowen (N.Y.) 613, 625." It is submitted that in the sense used by the cited cases that part of mens rea which is commensurate with the actus reus is always presumed from the actus reus. But May's insistence on the distinction between presumption and inference is technically proper. May, *Law of Crimes* 154 n. 8 (4th ed., Sears and Weihofen 1938).

80. For differing state rules see May, *op. cit. supra* note 79, at 155.

81. Perkins, *op. cit. supra* note 20, at 358. Kenny, *Outlines of Criminal Law* 180 (Turner and Armitage ed. 1952), though for seditious libel the rule has been otherwise since Lord Campbell's Act, 6 & 7 Vict. c. 96 (1843). Likewise, in English tort law the defense of truth is recognized. Kenny, *op. cit. supra*, at 180.

the jury should acquit if they have a reasonable doubt whether the matter published is true or not.⁸² But in the second place, where the matter published is clearly untrue, though the defendant reasonably believed it to be true, the rule is said to be otherwise and the defendant cannot be excused.⁸³ This rule, if correct, is inconsistent with *error facti excusat* and constitutes an instance of absolute liability. Burdick, to support the proposition, cites only one decision, the Massachusetts case of *Commonwealth v. Snelling*.⁸⁴ Unfortunately, the case upholds the proposition for which Burdick cited it. For failure of proof of actual truth the defendant was not even permitted to benefit from his claim of good motives and justifiable ends, since truth was, by an awkward statutory construction, regarded as a prerequisite of such further proof of good motives and justifiable ends.⁸⁵ In thus imposing absolute liability for libel, the court did not and could not follow any precedent, nor has the case been followed subsequently on this point. It may be regarded as a forerunner of statutory absolute liability in which Massachusetts later excelled,⁸⁶ but it cannot be said to represent the common law of libel, which is clearly contra. Where, for instance, a defendant reasonably and honestly, but mistakenly, believes his publication to refer to a true matter, protected by a qualified privilege, yet it turns out that the matter published is in fact not true, *error facti excusat* will protect the defendant and he is not criminally liable.⁸⁷ Lastly, it may be thought that an objective treatment of the definitional element "defamatory," in defamatory libel and the various special elements in the special offenses of libel, *e.g.*, "obscene," "tending toward a breach of the peace," or "blasphemous," may create absolute liability. It is, no doubt, difficult to ascertain a community standard, for example, of decency and propriety. Mr. Justice Frankfurter's point of view, that there is such a standard,⁸⁸ however shifting it may be, is the only rational one. But there are cases where the defendant, the public and the courts may honestly differ on the subsumption of the particular incident under the general standard. The better policy, it would seem, is to give the defendant

82. *State v. Bush*, 122 Ind. 42, 23 N.E. 677 (1889); *State v. Wait*, 44 Kan. 310, 24 Pac. 354 (1890); *McDonald v. State*, 73 Tex. Crim. 125, 164 S.W. 831 (1914).

83. 3 Burdick, *Law of Crime* 178 (1946).

84. 32 Mass. (15 Pick.) 337 (1834).

85. *Id.* at 362. A better result was achieved in *People v. Fuller*, 238 Ill. 116, 133, 87 N.E. 336, 342 (1909).

86. Mueller, *op. cit. supra* note 29, at 47-48.

87. See *State v. Lambert*, 188 La. 967, 178 So. 508 (1938); Perkins, *op. cit. supra* note 20, at 359-63. Cf., *State v. Greenville Publ. Co.*, 179 N.C. 720, 102 S.E. 318 (1920).

88. *Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952).

the benefit of the doubt, in order to protect the integrity of the mens rea principle and thus save defendants from conviction who possibly may have made an honest effort to stay within the standards of the legally permissible, regardless of the personal moral standpoint of the court. This position, as applied to seditious or group libel, is fully in accord with Mr. Justice Holmes' "clear and present danger test," used as a limitation of free speech.⁸⁹ "Obscenity" likewise is judged by objective, *i.e.*, community standards. But courts⁹⁰ and legislators⁹¹ have made an honest, and it would seem generally successful, attempt to abide by the community standard as evidenced by the *living law* of the prevalent moral code. These standards are ascertainable prior to a given publication, and honest though unsuccessful attempts to meet the standard can be and are taken into account at any stage of the prosecution, especially in sentencing. The same considerations apply to blasphemous libel. The limit between religious truth and falsity, decency and indecency, is an ascertainable community standard.⁹² Failure to comply is usually indicative of failure to have ascertained the standard. But it is clearly misleading to explain the libel cases by saying that "when the statute law expressly declares that a thing shall not be done, it becomes *ipso facto* illegal to do it."⁹³ I do not contend that the present standard of our law, and that traditionally applied by the common law, is a subjective one. It clearly is objective. But it is an ascertainable standard which, when flouted, strongly indicates an intention to go outside the limits of the permissible, or a recklessness and nonchalance sufficient as mens rea in matters about which our society as a whole has definite opinions. This and no more is required by mens rea. All that can possibly be advocated is a better disposition, as a matter of practice, of conceivable hardship cases where there was an honest effort to comply. An honest subsumption error should excuse.⁹⁴

89. *Schenck v. United States*, 249 U.S. 47, 52 (1919); dissenting with Mr. Justice Brandeis in *Gitlow v. New York*, 268 U.S. 652, 672 (1925).

90. *Roth v. United States*, 354 U.S. 476 (1957).

91. Model Penal Code § 201.10 (Tent. Draft No. 6, 1957) and see Schwartz, *Criminal Obscenity Law: Portents from Recent Supreme Court Decisions and Proposals of the American Law Institute Model Penal Code*, 29 Pa. Bar Ass'n Q. 8, 14-15 (1957).

92. *State v. Chandler*, 5 Del. (2 Harr.) 553 (1837).

93. Warburton, *Leading Cases In The Criminal Law* 5 (6th ed., Odgers and Armstrong, *sub. iii.* A Selection Of Leading Cases In The Criminal Law 1932).

94. *E.g.*, *Rosen v. United States*, 161 U.S. 29 (1896), applying an objective standard where a subjective one would have led to a reversal of the conviction. *Cf.*, *Regina v. Hicklin*, 3 Q.B. 360 (1868). Compare Model Penal Code, § 207.10 (Tent. Draft No. 6 1957), with excellent comment 14, at pp. 49-51, especially on state statutes which, in abrogation of common law, have introduced aspects of absolute liability.

We can see thus, that the criminal law of libel, as developed by the common law, does not operate with absolute liability in its direct form. But much more serious than the supposition that there is direct absolute liability in libel is the charge that the common law, unaffected by modern legislation, operates with criminal liability in the vicarious form. The rule is a familiar one in the common law of torts, where the problem is primarily one of loss distribution. Even the innocent proprietor of a print shop which published a defamatory matter was held strictly responsible, as it was deemed more equitable to shift the loss away from the victim, and to the print shop owner who, among those responsible in a purely causal sense, could financially best afford to sustain it, though often only one party could be deemed really responsible in a moral sense, the ordinarily indigent author of the libel. In tort law the maxim *qui facit per alium, facit per se* prevails and it could not be kept entirely out of the criminal law. Through this confusion of civil and criminal remedies, a few common law judges and virtually all text writers on the criminal law have subscribed to the supposition that at common law⁹⁵ the (indirect) publisher of a *criminal* libel is likewise absolutely liable.⁹⁶

Such a rule might have been a rational one in the era of the one-man-print-shop operator. For the individual and sole owner-operator it was almost impossible to commit a criminal libel innocently. But, as we shall see, even in the small enterprises of yesteryear the proprietor of the paper or serial in which libelous matter appeared would occasionally have a good defense, and the common law recognized such defenses to a large extent.

In the entire history of the English law only two cases stand for the proposition that a publisher is criminally liable for his libelous publication, or a sale thereof, regardless of intent, or defenses. In other words, by these two cases the publisher or seller is criminally responsible though he himself had nothing to do with the publica-

95. In England prior to Lord Campbell's Act, 6 & 7 Vict. c. 96 (1843). This section permits a newspaper proprietor (publisher), charged with criminal libel, to show that the libel was published without his authority and due to no lack of care on his part. Kenny, *op. cit. supra* note 81, at 34. This statute affirmed—in an era of some doubt—the applicability of the mens rea requirement in English criminal libel law.

96. 1 Bishop, *op. cit. supra* note 30, §§ 219.2-221; 2 Wharton, Criminal Law §§ 1964, 1990 (12th ed., Ruppenthal 1932); 3 Burdick, *op. cit. supra* note 83, § 802; 1 Russell, Crime c. 49 (10th ed. 1950); Clark and Marshall, A Treatise on the Law of Crimes § 189 (e) (5th ed. Kearney 1952); May, *op. cit. supra* note 18, § 38; Williams, *op. cit. supra* note 16, § 77.1; Kenny, *op. cit. supra* note 81, § 28; Cross and Jones, An Introduction To Criminal Law art. 14 (3d ed. 1953); of which Bishop's work contains the most considered and cautious statements. The most recent criminal law text, Perkins, *op. cit. supra* note 20, at 364, likewise presents a very careful account.

tion other than mere ownership of the publishing house or sales establishment.⁹⁷ But these two cases and a few others which came close to the imposition of absolute liability were to convey the impression that criminal libel required no mens rea at common law. The doubtful cases require a brief comment.

Shortly before, and during, the French revolution cases of criminal libel occurred with great frequency in England. *Rex v. Almond* was to set the pattern.⁹⁸ As a practical matter the case comes close to strict liability. Theoretically it stands for the proposition that a publisher may excuse himself by showing that he was not privy to the libel, and neither counseled nor encouraged its publication. There was some evidence of a practice among publishers to publish risky publications under the name of another publishing house, without the latter's consent. Almond contended that the libelous publication in question was no product of his. But the evidence was deemed insufficient to rebut the presumption of his own conduct.

Lord Mansfield had a great influence on the law of criminal libel. Three libel cases bear his imprint. In 1772 he made it certain that by his standards little, if anything, could excuse the publisher of a criminal libel.⁹⁹ Two years later he had to decide a case on the following facts: A libelous publication came out of the defendant's newspaper print shop. There was evidence that it was the defendant's practice to inspect his daily paper at 5 o'clock every morning, before its distribution. On the day in question defendant was ill and did not appear until after the paper with the libelous matter had been put into circulation. Defendant's horror about the publication, at least so he contended, could not undo its distribution. Lord Mansfield remarked: "I dare say they never read a thousandth part of what they publish. Are they, therefore, to justify their publications, be they what they will, because they publish they

97. *Rex v. Nutt*, Fitzg. 47, 94 Eng. Rep. 647 (K.B. 1729), where the Court of King's Bench ruled that the proprietor of a pamphlet shop is criminally liable for the sale of a libelous publication by his servant, although he knew nothing of either the receipt of the publication in the shop, nor of its sale. *Rex v. Walter*, 3 Esp. 21, 170 Eng. Rep. 524 (K.B. 1799), same as to publisher.

98. 5 Burr. 2686, 98 Eng. Rep. 411 (K.B. 1770).

99. "Upon motion for an information for a libel published against the Hon. Mr. Charles Fox, on shewing cause to rule, the printer declared he was not privy to the contents, nor to its being put into the paper; and was greatly concerned it should ever have been published, and stopped the sale immediately when he discovered it: and hoped, therefore, that the Court would not grant the information. Lord Mansfield.—It goes for nothing, and would be an excuse for all sorts of infamy. Rule absolute." Anon., Lofft 544, 98 Eng. Rep. 791 (K.B. 1772).

know not what?"¹⁰⁰ The evidence was held to be admissible in mitigation, but not in defense. Lord Mansfield still indicated that a strong excuse may constitute a good defense, but he never had occasion to find such an excuse. In the same year a further libel case came before him. The defendant publisher was in confinement at the time the libelous matter left his publishing house. Due to the fact that the confined publisher had the opportunity to read his paper daily and to be visited by his servants, such confinement was held not to constitute a defense to the charge of criminal libel, Lord Mansfield conceding that a tighter confinement might have been a good defense.¹⁰¹

We can say, then, that even by Lord Mansfield's strict standards¹⁰² criminal libel was not an offense of absolute liability. Justice Cockburn called Lord Mansfield's criminal libel decisions "a dark spot in the career of the learned lord. . . ."¹⁰³ "The success of Mansfield was qualified . . . by the unwillingness of his colleagues and successors to develop or even accept the principles he introduced."¹⁰⁴ He had indicated a way toward absolute criminal liability of the publisher of a libel. But only one later English case was to take this step.¹⁰⁵

Kenyon, D. J., was still under Mansfield's influence. But he did not go further. In *Rex v. Topham* he held that the law of criminal libel imputes an evil intent to the publisher, leaving it to him to rebut.¹⁰⁶ Two years later he indicated what he meant by rebuttal:

If the defendant could have shown that he had published the paper in question without knowing its contents, as that he could not read and was not informed of its tendency until afterwards, that argument might have been pressed upon the jury.¹⁰⁷

In the cases following, with the one exception noted,¹⁰⁸ it was held that it is up to the jury to decide whether the defendant pub-

100. *Rex v. Williams*, Lofft 759, 762, 98 Eng. Rep. 905, 906 (K.B. 1774).

101. *Rex v. Woodfall*, Lofft 776, 98 Eng. Rep. 914 (K.B. 1774).

102. Even beyond the field of criminal libel Lord Mansfield is known for his love of severity, e.g., I Radzinowicz, A History of English Criminal Law—The Movement for Reform 471 (1948).

103. 67 L.T. (n.s.) 1 (1879).

104. Stone, *The Province and Function of Law* 274 (1946).

105. *Rex v. Walter*, 3 Esp. 21, 170 Eng. Rep. 524 (K.B. 1799).

106. 4 T.R. 126, 100 Eng. Rep. 931 (K.B. 1791) and see my interpretation, *supra*, text at note 78.

107. *Rex v. Holt*, 5 T.R. 436, 444, 101 Eng. Rep. 245, 250 (K.B. 1793). The libel involved was of a seditious nature. There is a vague indication that seditious libels were regarded with greater severity.

108. *Rex v. Walter*, 3 Esp. 21, 170 Eng. Rep. 524 (K.B. 1799).

lished the libel with intent or not,¹⁰⁹ and that the defendant may, thus, rebut the inference of malice which arises from the fact of publication of libelous matter, so as to convince the jury of his innocence.¹¹⁰ In short, the defendant is only *prima facie* answerable, subject to his ability to establish an exemption.¹¹¹

Such was the law in 1843 when the Libel Act, popularly known as Lord Campbell's Act, was passed.¹¹² By section 7 the act provided that the publisher is not responsible for his servant's independent act of publishing a criminal libel where the master is non-negligently ignorant of the fact and can prove it. The statute, therefore, can be regarded as no more than a slight lift of the *mens rea* requirement from the status of negligence or heedlessness of supervision in every instance, to that of a general lack of oversight of the publishing business. For it now was recognized that "the prohibition not to violate the law is impliedly involved in every service" for which a master may employ a servant.¹¹³ Subsequent cases interpreting Lord Campbell's Act followed the interpretation given in *Regina v. Holbrook*.¹¹⁴ The belief in absolute criminal liability of the publisher of a libel at common law must be regarded as erroneous. Indeed, in the second half of the nineteenth century, after Lord Campbell's Act had left no further doubt that criminal libel requires *mens rea* in all cases, two eminent judges pronounced that it had always been the true rule at common law to admit a showing of the exercise of due care by the publisher as a defense to the charge of criminal libel,¹¹⁵ and this is the law of England today.¹¹⁶

In America a single case squarely supports the rule of absolute liability of a publisher of a criminal libel: *Commonwealth v. Buckingham*, decided in the Boston, Massachusetts, Municipal Court in

109. *Rex v. Reeves*, Peake Add. Cas. 84, 170 Eng. Rep. 202 (N.P. 1796), an interesting case. The House of Commons had declared by vote that the publication in question was libelous, and had urged King George III to cause a prosecution to be instituted. The attorney general, thereupon, pursuant to royal order, prosecuted the defendant. The jury returned a verdict of not guilty.

110. *Rex v. Harvey*, 2 B. & C. 257, 107 Eng. Rep. 379 (K.B. 1823).

111. *Rex v. Gutch*, M. & M. 432, 173 Eng. Rep. 1214 (N.P. 1829). But Tenterden, C.J., came again rather close to talking in terms of strict (vicarious) liability. *Id.* at 438, 173 Eng. Rep. at 1216.

112. Perkins, *op. cit. supra* note 20, at 358; Kenny, *Outlines of Criminal Law* 180 (Turner and Armitage ed. 1952).

113. *Regina v. Holbrook*, 3 Q.B. 60 (1877). On second trial, 4 Q.B. 42 (1878), the major case interpreting Lord Campbell's Act.

114. *Ibid.*

115. Cockburn, J., in *Lambri's Case*, 67 L.T. (n.s.) 1 (1879); Lord Coleridge, C. J., in *Regina v. Ridgway*, 71 L.T. (n.s.) 41 (1881).

116. *Ibid.* *Regina v. Bradlaugh*, 15 Cox Ct. Cas. 185 (1883); *Regina v. Ramsay*, (1883) 15 Cox Ct. Cas. 231; *Regina v. Munslow*, 1 Q.B. 758 (1895).

1824.¹¹⁷ Defendant publisher-proprietor was ill, and spent most of his time at home. He had not appointed a substitute to supervise the work in his office.¹¹⁸ The jury was charged that "as the paper was printed in the office of the defendant, by his servants, and for his profit,¹¹⁹ and as he has never disavowed it,¹²⁰ he is in law answerable for the contents."¹²¹ The case was sent back for retrial and, upon jury disagreement, was taken from them.¹²² A second case arose under a Pennsylvania statute, thought to be declaratory of the common law. The statute made writers, printers and publishers criminally liable for any and all libels published by them. Under this statute the court found a publisher liable for the publication inserted against his general order by a local editor. The court relied on "a long line of cases" in support, of which it cited but two, *Commonwealth v. Morgan*,¹²³ (which did require intent!) and a civil case. But all those uncited cases were thought to be "remarkably uniform and consistent. . . ."¹²⁴

A third case closely approaches the same rule, but was decided on principles of the law of contempt of court, rather than criminal libel.¹²⁵ Moreover, the court found that the publication of the contemptuous matter had been made wilfully, though finding ignorance of the contemptuous nature to be no excuse. Further cases supporting the supposed common law rule of absolute liability for the publication of a criminal libel could not be located.

The American rule is clear and, apart from one or two lower court cases to the contrary, always has been that malice in the sense of intent to publish the defamation is required to hold any defendant, writer, printer or publisher, liable for the misdemeanor of libel.¹²⁶ In other words, from the fact of the publication of the defamation the intent to publish the defamation may be deduced.¹²⁷ This rule applies to the author as well as the publisher, printer, or publisher-proprietor. In Massachusetts and New York truth may be a good

117. Thacher, Criminal Cases 29 (1845).

118. Query, would the result have been different had he done so?

119. The mention of profit makes it clear that the court thought in terms of civil loss distribution, showing an inability to make the switch from civil to criminal law thinking.

120. But retraction surely does not alter the result of a libel in the criminal law.

121. Thacher, Criminal Cases 29, 40 (1845).

122. *Id.* at n. 47.

123. 107 Mass. 199 (1871).

124. *Commonwealth v. Willard*, 9 W.N.C. 524, 526 (Pa. 1881).

125. *People v. Wilson*, 64 Ill. 195 (1872).

126. *State v. White*, 29 N.C. 180 (1847); *People v. Eastman*, 89 Misc. 596, 152 N.Y. Supp. 314 (1915), under N. Y. Pen. Law § 1344, declaratory of common law.

127. For the general rationale see text at notes 77-78 *supra*.

defense if the publication has been made with good motives and for justifiable ends.¹²⁸ This is the only tenable position.

Partially by judicial development and partially by statutes, which are hardly more than declaratory of the common law, the rule with respect to defenses has been stated in terms of negligence: A publisher is presumed to have knowledge of any libelous matter published by, under, or through him, but the law will not hold him criminally responsible unless he was negligent in the supervision of his business. The defense would be that the publisher exercised due care in the supervision of his publishing establishment, and that his use of due care could not avert the result.¹²⁹ This makes it clear that a publication by the publisher's employee in violation of the publisher's order will not be attributed to him.¹³⁰ It is the law today, with or without statute,¹³¹ that a publisher must take care and investigate fully before he publishes, but when despite his precautions a criminal libel occurs, the publisher must be shown to have been negligent.¹³² This rule encompasses mens rea fully.

In passing I should mention that the cases here discussed show a different treatment by the courts depending on the nature of the libel. As a sociological matter it is self-evident that one case may obtain more judicial or jury sympathy than another. These sympathies seem to have affected, though not become part of, legal doctrine. Courts appeared less demanding on the question of mens rea in cases of aggravating libels, more demanding in slighter libels. It is impossible to form a pattern of these impressions. Without relying on authority, counsel for defendant in *Commonwealth v. Buckingham* urged upon the court that the libel was not directed against the government, a magistrate, or one in high office; nor was it such that the public or the individual might be disturbed, nor by which the peace and happiness of the domestic circle may be dis-

128. *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1825); *Commonwealth v. Snelling*, 32 Mass. (15 Pick.) 337 (1834); *Barthelemy v. People*, 2 Hill 248 (N.Y. 1842); *Commonwealth v. Bonner*, 50 Mass. (9 Met.) 410 (1845).

129. *Commonwealth v. Morgan*, 107 Mass. 199 (1871); *Commonwealth v. Damon*, 136 Mass. 441 (1884); *State v. Mason*, 26 Ore. 273, 38 Pac. 130 (1894); *Benton v. State*, 49 N.J.L. 551, 36 Atl. 1041 (Ct. Err. & App. 1897); *People v. Fuller*, 238 Ill. 116, 87 N.E. 336 (1909).

130. *Commonwealth v. Rovnianek*, 12 Pa. Super. 86 (1899), in which case the master was out of state when, in disobedience to his orders, the libelous publication was made.

131. A collection of statutory references may be found at Hale, *The Law of the Press* 125-27 (1948). American statutes differ from each other only as to minor aspects.

132. *Benton v. State*, 59 N.J.L. 551, 36 Atl. 1041 (Ct. Err. & App. 1897).

turbed, nor was it of a seditious nature.¹³³ The test of excuse in the case of a seditious libel, it will be recalled,¹³⁴ was rather strict as a practical matter, as was that in the case of a contempt of court.¹³⁵ In a more recent Minnesota case, *State v. Workers' Socialist Publishing Co.*,¹³⁶ the libel charged amounted to criminal syndicalism, under a statute which provided that "every editor or proprietor of a book, newspaper, or serial, and every manager of a . . . corporation by which any . . . newspaper . . . is issued, is chargeable with the publication of any matter contained in such book, newspaper, or serial."¹³⁷ Despite this strict language, the court refused to apply the statute under circumstances negating any presumption of privity, or connivance, or want of ordinary precaution.¹³⁸ It is gratifying to see a modern decision adhering to, rather than abandoning, the requirements of mens rea, if only in the form of criminal negligence, and even in the case of a libel of an aggravated nature.

Two or three older lower court cases notwithstanding, it is, and has been, the rule at common law, in America as well as in England, that: (a) the misdemeanor of libel requires mens rea as to all elements. The use of a community standard, rather than a subjective standard, for determination of the nature of the publication, as a material element of the offense, has, on the whole, not created palpably unjust decisions inconsistent with mens rea; (b) a publisher is not criminally liable for the libel published for him or through his facilities, unless he was heedless, reckless, or negligent in the conduct of his business, through which lack of care the publication of the libelous matter has come about. This form of liability, therefore, is not one of vicarious liability, but one of direct liability for an omission, with the requirement of mens rea in the form of intention or negligence.

The universal doctrine that there can be no crime without a criminal mind, necessarily applies to libel.¹³⁹

B. Domestic Misdemeanors

Through more dicta than decisions, and by the constant reiteration in text books, the rule is well known that when at common law a married woman commits a felony in her husband's presence, a rebuttable legal presumption arises that the woman acted under the

133. Thacher, *op. cit. supra* note 117, at 46.

134. See note 107 *supra*.

135. See note 125 *supra*.

136. 150 Minn. 406, 185 N.W. 931 (1921).

137. *Id.* at 410, 185 N.W. at 933.

138. *Id.* at 410-11, 185 N.W. at 933.

139. 1 Bishop, *op. cit. supra* note 30, § 922.

coercion of her husband.¹⁴⁰ The rule began as one of mercy toward women. But when the presumption in the wife's favor turned to one against the husband, it became a rule of severity toward men.¹⁴¹ Fortunately, in the felony area there is no case which would lead to the conclusion that an innocent husband suffered the penalty for his guilty wife. "Presence" had to be established before the rule could come into operation.¹⁴² An easy burden of rebutting the presumption makes it clear that we cannot talk of vicarious liability under this rule. But in the cases where the presumption of coercion had been rebutted, it was usually found by convincing evidence that the husband, in whose liability alone we are interested here, participated with his wife in the perpetration of the felony with the acts and the frame of mind of, at least, a common law aider and abettor.¹⁴³

We may take it then, that mere knowledge, or even mere presence, alone, does not create liability in the husband for the felony of his wife. He must at least be a common law accessory. The liability for a wife's felony differs in only one respect from ordinary common law principles, *viz.*, by the existence of a rebuttable presumption of coercion by the husband if his presence at the scene of the crime has been established.

Commingled with the doctrine of presumptive coercion, a rule of vicarious liability of the husband for the domestic misdemeanors of his wife developed in the eighteenth and nineteenth centuries. This rule has not been properly understood or treated by any of the modern text book writers, save Sears and Weihofen.¹⁴⁴ The scholarly literature on the topic consists of a total of two extremely short

140. 1 Bishop, *op. cit. supra* note 30, c. 24; 2 Wharton, *op. cit. supra* note 96, §§ 92-94; 1 Burdick, *op. cit. supra* note 83, §§ 162-65; 1 Russell, *op. cit. supra* note 96, at 70-72; Perkins, *op. cit. supra* note 20, c. 8, § 4; Williams, *op. cit. supra* note 16, §§ 187-89; Clark and Marshall, *op. cit. supra* note 96, §§ 73-75; Dangel, Criminal Law § 79 (1951); May, *op. cit. supra* note 79, § 35; Kenny, *op. cit. supra* note 81, § 45; Cross and Jones, *op. cit. supra* note 96, c. 4, art. 18; MacQueen, The Rights and Liabilities of Husband and Wife 83-86 (4th ed. Paine 1905).

141. Commonwealth v. Hill, 145 Mass. 305, 14 N.E. 124 (1887).

142. *E.g.*, State v. Nelson, 29 Me. 329 (1849) (receiving stolen goods); Commonwealth v. Eagan, 103 Mass. 71 (1869) (assault and battery).

143. Rex v. Hughes 2 Lewin 229, 168 Eng. Rep. 1137 (1829); Davis v. State, 15 Ohio 72 (1846) (arson); Goldstein v. People, 82 N.Y. 231 (1880) (receiving stolen goods); Bibb v. State, 94 Ala. 31 (1891) (murder). But in United States v. Terry, 42 Fed. 317 (N.D. Cal. 1890), the presumption was overcome and the husband, a prisoner in the dock, was not found guilty for his wife's offense of resisting an officer, committed in the court room.

144. May, *op. cit. supra* note 79, at § 39. Professor Perkins also indicated his awareness of the rule in his discussion of the doctrine of coercion. Perkins, *The Doctrine of Coercion*, 19 Iowa L. Rev. 507, 513-14 (1934).

review notes,¹⁴⁵ and a few case annotations of merely encyclopedic nature.¹⁴⁶

As far as can be determined, in England the rule of a husband's vicarious liability for the domestic misdemeanors of his wife was in existence as early as 1712 and 1715. In *Regina v. Williams*,¹⁴⁷ it was held that both husband and wife may be indicted for the wife's keeping a bawdy house in the common home. *Rex v. Dixon* was a similar case,¹⁴⁸ where both husband and wife were indicted, and coercion was not presumed. It is noteworthy that both cases involved nuisances,¹⁴⁹ that both were, of course, misdemeanors, and that both offenses were of a "domestic" nature, that is, involving the family home. To bawdy houses and common gaming houses a third category was to be added later, *viz.*, tippling houses. Ever since, the rule has stayed within these confines.¹⁵⁰

The earliest known American case standing for the rule was decided in 1847. The beginning of the development, thus, coincides with the development of absolute criminal liability by statutory enactment or interpretation.¹⁵² The most recent case was decided in 1928.¹⁵³ The bulk of cases stems from the 1870's and 1880's, and the early prohibition era following World War I.

By far the largest number of cases came from Massachusetts; other states are represented only by occasional decisions. The fact that there has been a complete lapse of decisions since 1928 is indicative of the present unimportance of this doctrine. Since lapse of time does not abolish rules of common law, once established, however much of the rule discussed here must still be regarded as law in American jurisdictions.¹⁵⁴

Hawkins has aptly stated the reason for the domestic misdemeanor rule when he defined the class of offenses: "[Offenses] as

145. Notes, 31 Yale L.J. 337 (1922); 20 Mich. L. Rev. 547 (1922).

146. Annotations, 6 Am. Dec. 106 (1878); 33 Am. St. Rep. 89 (1891); 4 A.L.R. 266 (1919); 19 A.L.R. 136 (1922); 71 A.L.R. 1116 (1931).

147. *Regina v. Williams* at 1 Salk. 384, 91 Eng. Rep. 334 (K.B. 1712).

148. 10 Mod. 335, 88 Eng. Rep. 753 (K.B. 1715).

149. In which area, as I shall show in the next section, some form of absolute liability developed outside the group of domestic offenses. But not all later cases under the instant rule were concerned with what actually amounted to nuisances.

150. The interstate transportation of a prostitute for the purpose of placing her into a bawdy house to be established by the defendant wife was held to be within the domestic misdemeanor rule, *Dawson v. United States*, 10 F.2d 106 (9th Cir. 1926); but not the abduction of a minor girl by defendant wife, *State v. Nowell*, 156 N.C. 648, 72 S.E. 590 (1911).

151. *State v. Bantz*, 11 Mo. 27 (1847).

152. Compare Mueller, *op. cit. supra* note 29.

153. *People v. Duchow*, 331 Ill. 636, 163 N.E. 352 (1928).

154. The following does not purport to give an encyclopedic account of the cases. The less important cases have been omitted, unless they were not listed in one of the annotations, see note 146 *supra*.

to the government of the house, in which the wife has a principal share; and also such [offenses] as may generally be presumed to be managed by the intrigues of her sex."¹⁵⁵ Hawkins was probably not far off with this appraisal. An equally classic and even more poetic explanation was given by the Supreme Court of West Virginia in *State v. Jones*:

No one could imagine for a moment that any woman could be coerced by her husband into keeping a house of ill fame, nor that any pure wife, free from blame would remain at such a house kept without her consent and connivance. This is one instance in which man, poor man, is not wholly to blame, and it is only the most vicious and depraved men and women that keep, abide in and frequent such abominable institutions, the open jaws of man's eternal destruction. While man's depravity creates the demand for such unhallowed resorts, it is woman's depravity that keeps up the supply. Their prostitution is equally reprehensible and corruptible of and injurious to public morals. . . . Mame cannot blame Festus, nor Festus Mame, but both are equally guilty and should suffer punishment alike.¹⁵⁶

This sufficiently states the sociological justification for the removal of this class of offenses from the sweep of the presumptive coercion rule. In Massachusetts, however, the words of Hawkins, reiterated by Bishop, followed in England, and even in an early Massachusetts case, left no impression. Without any important exception, all Massachusetts cases adhere to the mistaken belief that in domestic misdemeanors the rule is not different from what it was believed to be for felonies where the rule of the husband's presumed coercion prevails.¹⁵⁷ A few other states followed the Massachusetts

155. 1 Hawkins, *Pleas of the Crown*, c. 1, § 12 (6th ed. 1787).

156. 53 W. Va. 613, 616-17, 45 S.E. 916, 917 (1903).

157. *Commonwealth v. Murphy*, 68 Mass. (2 Gray) 510 (1854); *Commonwealth v. Burk*, 77 Mass. (11 Gray) 437 (1858); *Commonwealth v. Butler*, 83 Mass. (1 Allen) 4 (1861); *Commonwealth v. Feeney*, 95 Mass. (13 Allen) 560 (1866); *Commonwealth v. Wood*, 97 Mass. 225 (1867); *Commonwealth v. Cannon*, 97 Mass. 547 (1867); *Commonwealth v. Tryon*, 99 Mass. 442 (1868); *Commonwealth v. Munsey*, 112 Mass. 287 (1873); *Commonwealth v. Cheney*, 114 Mass. 281 (1873); *Commonwealth v. Reynolds*, 114 Mass. 306 (1873); *Commonwealth v. Roberts*, 132 Mass. 267 (1882); *Commonwealth v. Hopkins*, 133 Mass. 381 (1882); *Commonwealth v. Gormley*, 133 Mass. 580 (1882); *Commonwealth v. Flaherty*, 140 Mass. 454, 5 N.E. 258 (1886); *Commonwealth v. Hill*, 145 Mass. 305, 14 N.E. 124 (1887); *Commonwealth v. Daley*, 148 Mass. 11, 18 N.E. 579 (1888); *Commonwealth v. Walsh*, 165 Mass. 62, 42 N.E. 500 (1895); *Commonwealth v. Whipple*, 181 Mass. 343, 63 N.E. 919 (1902); *Commonwealth v. Helfman*, 258 Mass. 410, 155 N.E. 448 (1927). All these cases ignore the recognition, *obiter*, by an early Massachusetts court that domestic misdemeanors "where the wife may be presumed the principal agent" are an exception to the presumptive coercion rule. *Commonwealth v. Neal*, 10 Mass. 152, 6 Am. Dec. 105, 106 (1813). Adherence to the belief is more obvious in some cases than in others, but cases in which it is not outspoken, have been omitted from this list.

lead without much questioning.¹⁵⁸ But in West Virginia,¹⁵⁹ Iowa,¹⁶⁰ New Jersey,¹⁶¹ Michigan,¹⁶² Washington,¹⁶³ Wisconsin,¹⁶⁴ the federal jurisdiction,¹⁶⁵ and perhaps Missouri¹⁶⁶ and North Carolina,¹⁶⁷ the courts did not treat the rule as an outgrowth of the doctrine of presumptive coercion. In an old New York case the impossible was achieved of explaining this liability on *both* grounds.¹⁶⁸

There can be little doubt but that Hawkins' explanation, which antedates any of the Massachusetts cases, is the proper one, and that the Massachusetts explanation is erroneous.

We are now confronted with the problem of analyzing the legal reasoning behind the rule. The question, then, is: If the wife is the principal perpetrator and is not presumed to act under the coercion of her husband, and if the husband is guilty of no more than actual or constructive knowledge; how can he be held criminally liable with his wife, or even in lieu of his wife? And closely allied with this is the further question: Why should the husband be made liable at all?

After rejection of much conjecture I have come to the conclusion that the real reason for the rule is this: It was thought to be plainly immoral to permit a husband to go free where knowledge of the maintenance of a criminal nuisance (whether technically so or not) of an immoral nature in his home could be imputed to him, or, more frequently, was even actually known to him. The judges as *custodes morum*, therefore, borrowed the concept of vicarious liability from the civil side of the law and used it on the criminal side. The only course open for the imposition of such liability on the otherwise nonliable husband was the application of the common law principle

158. *State v. Boyle*, 13 R.I. 537 (1882); *State v. Shee*, 13 R.I. 535 (1882); *Mulvey v. State*, 43 Ala. 316, 94 Am. Dec. 684 (1869); *Hensly v. State*, 52 Ala. 10, 1 Am. Crim. Rep. 465 (1875); and see *King v. City of Owensboro*, 187 Ky. 21, 218 S.W. 297 (1920). The law of North Carolina is uncertain. Compare *State v. Seahorn*, 166 N.C. 373, 81 S.E. 687 (1914) with *State v. Nowell*, 156 N.C. 648, 72 S.E. 590 (1911).

159. *State v. Jones*, 53 W. Va. 613, 45 S.E. 916 (1903).

160. *State v. Gill*, 150 Iowa 210, 129 N.W. 821 (1911).

161. *State v. Grossman*, 95 N.J.L. 497, 112 Atl. 892 (Ct. Err. & App. 1921) (holding that although there is no presumption of coercion, the wife may, nevertheless, establish actual coercion in her defense, as in other crimes).

162. *People v. Wheeler*, 142 Mich. 212, 105 N.W. 607 (1905); *People v. Sybisloo*, 216 Mich. 1, 184 N.W. 410, 19 A.L.R. 133 (1921); *People v. Liebiotka*, 216 Mich. 316, 185 N.W. 825 (1921).

163. *State v. Arrigoni*, 119 Wash. 358, 205 Pac. 7 (1922).

164. *Haffner v. State*, 176 Wis. 471, 187 N.W. 173 (1922).

165. *Dawson v. United States*, 10 F.2d 106 (9th Cir. 1926).

166. See *State v. Keithley*, 142 Mo. App. 417, 127 S.W. 406 (1910).

167. See *State v. Nowell*, 156 N.C. 648, 72 S.E. 590 (1911). But see *State v. Seahorn*, 166 N.C. 373, 81 S.E. 687 (1914).

168. *Commissioners of Excise v. Keller*, 20 How. Pr. 280 (N.Y. Sup. Ct. 1860).

according to which the husband, as the head of the spousal community, had the right to restrain his wife from making an illegal use of the common home.¹⁶⁹ According to the older authorities, a husband was entitled to chastise his wife with a rod no thicker than his thumb, to force her to obedience and lawful conduct.¹⁷⁰ This, of course, was a private law theory. The husband, as the owner of all property, including that brought in by his wife, was the only person from whom redress for the wrong of any family member could be obtained. Interestingly enough, in at least one case, the court looked behind the prerogative to chastise, and based liability in domestic misdemeanor cases directly on the "one-person" theory of marriage.¹⁷¹ The husband's prerogatives had largely ceased to exist when the rule under discussion became part of the common law of the United States. But not only had reliance on the old prerogative of the husband's corporeal chastisement of his wife provided a convenient means for now extending liability to him, it was, in addition, still a time when wives were under greater dominance of their husbands than they are today. Even as late as 1921 it was believed that such an imposition of punishment upon the husband made for "domestic tranquility and social peace."¹⁷² It is highly probable that the English judges in *Williams* and *Dixon* were moved by the same consideration, but 200 years earlier.

Without going into any further sociological or legal explanations — which would be of purely historical interest — I should like to summarize the domestic misdemeanor rule as follows:

(1) As a matter of practice, husband and wife are usually joined in the indictment for the wife's domestic misdemeanor.¹⁷³

(2) The husband will be indicted and convicted alone where the court excuses the wife on the ground of actual or inferred co-

169. *Commonwealth v. Wood*, 97 Mass. 225 (1867); *Commonwealth v. Barry*, 115 Mass. 146 (1874); *Commonwealth v. Kennedy*, 119 Mass. 211 (1875); *Commonwealth v. Carrol*, 124 Mass. 30 (1878); *Commonwealth v. Hill*, 145 Mass. 305, 14 N.E. 124 (1887); *Commonwealth v. Walsh*, 165 Mass. 62, 42 N.E. 500 (1895); *State v. Rozum*, 8 N.D. 548; 80 N.W. 477 (1899); *People v. Liebiotka*, 216 Mich. 316, 185 N.W. 825 (1921); *State v. Arrigoni*, 119 Wash. 358, 205 Pac. 7 (1922). It makes no difference that the premises on which the wife commits the offense are here separate property. *State v. Rozum*, 8 N.D. 548, 80 N.W. 477 (1899); *Commonwealth v. Pratt*, 126 Mass. 462 (1879).

170. *Stewart, Husband and Wife* § 63 (1887).

171. *King v. City of Owensboro*, 187 Ky. 21, 218 S.W. 297 (1920). But no liability in this case, as a statute was deemed to have abolished the rule.

172. *People v. Sybisloo*, 216 Mich. 1, 184 N.W. 410 (1921). See Note, 31 Yale L. J. 337 (1922).

173. *E.g.*, *Regina v. Williams*, 1 Salk. 384, 91 Eng. Rep. 334 (K.B. 1712); *State v. Bentz*, 11 Mo. 27 (1847); *Commonwealth v. Cheney*, 114 Mass. 281 (1873); *State v. Gill*, 150 Iowa 210, 129 N.W. 821 (1911).

ercion,¹⁷⁴ or, independent of this rule, where under the domestic misdemeanor rule "vicarious liability" is understood to mean supplanted rather than supplemented liability.¹⁷⁵

(3) The wife will be indicted and convicted alone where she commits the domestic misdemeanors in the absence of her husband,¹⁷⁶ or where her acts are in defiance of her husband's orders.¹⁷⁷

(4) Both the husband and the wife will be indicted and convicted where the presumptive coercion is overcome by the wife's independent acts in the proximity of her husband,¹⁷⁸ or acts evidencing the wife's active participation with her husband,¹⁷⁹ or, independent of the presumptive coercion rule, where under the domestic misdemeanor rule vicarious liability is understood to mean supplemented rather than supplanted liability,¹⁸⁰ or where both husband and wife are liable as principals, or principal and accessory under ordinary common law rules.¹⁸¹

This, then, is the domestic misdemeanor rule. What started out as a presumption in favor of the wife became in many cases a pre-

174. *Commonwealth v. Pratt*, 126 Mass. 462 (1879); *Commonwealth v. Burk*, 77 Mass. (11 Gray) 437 (1858); *Commonwealth v. Kennedy*, 119 Mass. 211 (1875); *Commonwealth v. Wood*, 97 Mass. 225, 228 (1867), ("he alone is held responsible for such crimes."); *Mulvey v. State*, 43 Ala. 316, 94 Am. Dec. 684 (1869). See *Commonwealth v. Barry*, 115 Mass. 146 (1874).

175. *State v. Arrigoni*, 119 Wash. 358, 205 Pac. 7, 27 A.L.R. 310 (1922); *People v. Sybisloo*, 216 Mich. 1, 184 N.W. 410, 19 A.L.R. 133 (1921); *People v. Liebiotka*, 216 Mich. 316, 185 N.W. 825 (1921). Cf. *Commissioners of Excise v. Keller*, 20 How. Pr. 280 (N.Y. Sup. Ct. 1860).

176. As discussed. See *Commonwealth v. Cheney*, 114 Mass. 281, 282 (1873), where the wife alone was indicted as "the head woman" of a bawdy house. The husband was thought to be likewise guilty "if he resides with her in the house." *Commonwealth v. Feeney*, 95 (13 Allen) Mass. 650 (1866).

177. Possibly with the further restriction that she commits the acts on "her" own property, as discussed.

178. *Commonwealth v. Hopkins*, 133 Mass. 381 (1882).

179. *Commonwealth v. Tryon*, 99 Mass. 442 (1868); see *Commonwealth v. Gannon*, 97 Mass. 547 (1867).

180. *State v. Jones*, 53 W. Va. 613, 45 S.E. 916 (1903); *State v. Grossmann*, 95 N.J.L. 497, 112 Atl. 892 (Ct. Err. & App. 1921).

181. E.g., *State v. Bentz*, 11 Mo. 27 (1847), where both the husband and the wife were indicted for jointly keeping a bawdy house. This is the oldest American case in this field of law. Reliance is placed only on the old English case of *Regina v. Williams*, *supra* note 147.

Commonwealth v. Tyron, 99 Mass. 442 (1868), where the husband maintained the liquor nuisance in cooperation with his wife. Both were found guilty as principals.

State v. Gill, 150 Iowa 210, 129 N.W. 821 (1911), where the husband was convicted with his wife, for keeping a house of prostitution. The husband was guilty as principal for keeping the house in which his wife, as abettor, was the only prostitute.

State ex rel. Seeberger v. Tillotta, 202 Iowa 1217, 211 N.W. 721 (1927); in this case the wife was likewise indicted and convicted for failure to take active steps to prevent her husband from maintaining a liquor nuisance in the common home. There was evidence that the wife had asked the husband to remove the nuisance.

sumption against the husband in the blossoming time of the rule,¹⁸² and, in the rule's withering days, was taken merely "for what it is worth."¹⁸³

With a fine feeling for realities, the courts have filled a gap and invented a rule of liability of the husband for the publicly detrimental domestic offenses of his wife, which the husband had a power to prevent. The implication of the domestic misdemeanor rule is just the opposite of that of the presumptive coercion rule. The former is based on a superabundance of the wife's influence—in the domestic sphere, the latter on a superabundance of the husband's influence in the public sphere. The former means to exert pressure on the husband to exercise more influence on his wife, the latter to exercise less.

The presumptive coercion rule has no more justification in the common law, but the domestic misdemeanor rule has its place. If abrogated, it will, unless a statute has taken its place, leave a gap in the law. But since the domestic misdemeanor rule has been derived from principles of private law, alien to *actus reus* and *mens rea* requirements of the criminal law, care should be taken to limit the rule to proper confines. Consent and sufferance, *i.e.*, permission, irrebuttably implied from knowledge said to arise from constructive presence, is an anomaly which has no place in the criminal law.

My study of the law of domestic misdemeanors has convinced me that, on a larger scale than in the libel field, a confounding of civil and criminal doctrine has led to a limited disregard of the traditional common law *mens rea* requirement. The errors committed have been pointed out. This limited, unusual and isolated departure from common law *mens rea* principles leads me to conclude that the ethical status of the common law of crimes, as reflected by *mens rea*, has not suffered a material repudiation.

C. Criminal Nuisance

The law of criminal nuisance is said to present a further major example of a dispensation with *mens rea* requirements.¹⁸⁴ The authorities cited for the proposition are often repeated and rarely

182. *Commonwealth v. Hill*, 145 Mass. 305, 14 N.E. 124 (1887).

183. *Commonwealth v. Helfman*, 258 Mass. 410, 416, 155 N.E. 448, 450 (1927).

184. *Bishop, op. cit. supra* note 30, § 1075; 2 *Wharton, op. cit. supra* note 96, §§ 1688-90; 3 *Burdick, op. cit. supra* note 83, § 887; *Russell, op. cit. supra* note 96, at 1674; *Perkins, op. cit. supra* note 20, at 829; *Clark and Marshall, op. cit. supra* note 96, § 189(f); *May, op. cit. supra* note 79, at 3, 44; *Williams, op. cit. supra* note 16, § 77.2; *Kenny, op. cit. supra* note 81, §§ 28, 447; *Cross and Jones, op. cit. supra* note 96, at 49, 68; *Baty, Vicarious Liability c. 10* (1916); *Sayre, Criminal Liability for the Acts of Another*, 43 *Harv. L. Rev.* 688 (1930).

re-examined. It will, therefore, be necessary to subject all relevant cases to close scrutiny.

A public nuisance is a common law misdemeanor. In the last century and a half the scope of the law of nuisances has been enlarged by statutory additions; the definitions of many nuisances have been altered. But the principles applying to the interpretation of this misdemeanor have remained as at common law. Unless, therefore, a statute has been interpreted as modifying the principles of construction and liability for a particular nuisance, we must take it as a common law nuisance, subject to common law interpretation. In the following I shall rely on a number of cases dealing with the principles of liability for common law nuisance *stricto sensu*, as well as those added or altered by statute, but left for construction and interpretation in accordance with common law principles. This limitation results in the exclusion of virtually all nuisances in violation of laws regulating the sale of intoxicating liquors. The liquor cases must be treated as a separate category. They are not restricted to nuisances, but include other violations of the liquor laws as well, all subject to the same principles of interpretation, though not with uniform results.¹⁸⁵ For the purpose of convenience I shall again begin with a treatment of the English law. To some extent I can here rely on the excellent treatise by Mr. Baty,¹⁸⁶ who analyzed the cases critically and traced the various doctrines to the predilections of the judges who expounded them.

We should go back as far as *Rex v. Watts*,¹⁸⁷ decided at a time when absolute liability of a publisher for the libel of his agent had been pronounced once already, and one year prior to Lord Tenterden's second ruling to this effect.¹⁸⁸ The *Watts* case involved the liability of a ship owner for criminal nuisance in obstructing the King's highway through the sinking of a vessel in a navigable river. It was proved in behalf of the defendant that the sinking had been by accident or misfortune, which was held to be a good defense.¹⁸⁹ *Vis major*, undoubtedly, is the strongest possible defense (namely excluding *actus reus*). Query whether any lesser defense, such as mistake of fact (as merely excluding *mens rea*), would have excused for nuisance in 1798.

The issue of vicarious liability and the applicability of ordinary

185. The liquor offenses, as an aspect of absolute liability imposed by statute, will be discussed elsewhere. For partial discussion see Mueller, *op. cit. supra* note 29.

186. Baty, *op. cit. supra* note 184.

187. 2 Esp. 675, 170 Eng. Rep. (N.P. 1798).

188. See text at note 98, *supra*. See Baty, *op. cit. supra* note 184, at 199.

189. Compare with *State v. Gould*, 40 Iowa 372 (1875).

defenses was squarely presented in *Rex v. Medley*.¹⁹⁰ Without the defendant's orders, the employees of a gas works had directed odious fumes into a river, thereby polluting it. The defendant officers were held criminally liable, it being sufficient that they had given orders to the workmen to conduct the works in general. There can be no doubt that this principle goes back to Lord Tenterden's broad proposition that "... a person who derives profit from, and furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, is answerable, [criminally] for the acts of that agent."¹⁹¹

A second case of obstruction of the King's highway was decided in 1836.¹⁹² Here the problem was one of direct rather than vicarious criminal liability. Defendant had caused a causeway to be built into a navigable stream. He was held to have been properly convicted for nuisance, his intent being irrelevant. Evidence of good intention and resulting benefit to others was immaterial. We should observe that, properly speaking, liability in this case was imposed on *actus reus* alone. Defendant consciously brought about a certain state of affairs. If he did in fact not know that his action constituted a nuisance, then he labored under a mistake of law — more properly a subsumption error — which, of course, does not excuse him. But this case demonstrates anew that hardships may be caused if *error juris nocet* is applied to offenses which are not part of the moral code.

The most famous case was decided in 1866: *Regina v. Stephens*.¹⁹³ Defendant was the senile owner of a slate quarry, managed entirely by his sons. He was unable to visit the quarry, but had given general instructions to operate the quarry in a proficient and lawful manner, as he established by evidence. Acting against these orders, the workmen dumped refuse slate into the river, thereby establishing a nuisance in the obstruction of the highway. *Mens rea* was held not to be required, the owner being absolutely liable for any criminal act committed by workmen in his employment for his profit. The court explained why such an absolute liability could be imposed and, as it thought, in fact had always been imposed, by calling the action a civil one, though criminal in form.

The sophistry in *Regina v. Stephens* hardly suffices to constitute an excuse for dispensing with common law requirements of *actus reus* and *mens rea*. If a civil action becomes criminal in form, *i.e.*,

190. 6 Car. & P. 292, 172 Eng. Rep. 1246 (N.P. 1834).

191. *Rex v. Gutch* (1829) M. & M. 432, 437, 173 Eng. Rep. 1214, 1216 (N.P. 1829), a concurring opinion, going further than that of the majority. See libel note 111, *supra*.

192. *Rex v. Ward* 4 Ad. & E. 384, 111 Eng. Rep. 382 (K.B. 1836).

193. L.R. 1 Q.B. 702 (1867).

subject to criminal sanctions, it becomes a criminal offense. Thus, the whole concept of the civil offense is an anomaly, coined only to explain, though not to justify, the imposition of absolute liability in certain cases. Every crime which is also a tort, is a civil offense by definition and criteria of gravity or heinousness of the offense cannot be used to restrict the meaning of the term to lighter offenses. The civil offense concept is nothing but the demonstration of an age-old legislative wisdom: to rule by civil¹⁹⁴ law as long as possible, but to make use of the criminal law with respect to particular conduct when the civil sanction alone is no longer effective. But when this decision is made, we are confronted with a new crime, not a civil offense, and the criminal law must be applied in its totality. *Regina v. Stephens* was the case to go all the way in applying the transplanted civil law rule *qui facit per alium facit per se*.

Blackburn, J., of fame in the development of absolute liability, renedered the third decision on the *qui facit* principle in a smoke nuisance case.¹⁹⁵ The imposition of absolute liability on the owners of the premises creating the nuisance was soon to be modified by *Chisholm v. Doulton*,¹⁹⁶ in which the judges held that a master who had supplied his employee with proper equipment, could not be held absolutely responsible for the smoke nuisance created by the employee through the latter's negligence. As the case was decided at a time when more and more legislation dispensed with the mens rea requirement, the court saw fit to rely on the statute on which the proceeding was based, rather than on principles of common law nuisance. Thus, the court said that the legislature may dispense with mens rea requirements, but that the prosecution had failed to establish such a legislative intention in the instant case. *Chisholm v. Doulton*, however, did not terminate absolute liability in the nuisance field. In *Attorney-General v. Tod Heatley*,¹⁹⁷ an action for abatement of a criminal nuisance rather than for the imposition of a penalty, the judges again declared that mens rea and scienter of the "responsible" person were of no significance. With this case the era of absolute liability for a common law criminal nuisance found its end in England. There are two reasons for this end. First, statutory law replaced virtually all the common law of nuisance and

194. Both in the meaning of contrast to criminal, and "polite" or "urbane".

195. *Barnes v. Akroyd* L.R. 7 Q.B. 474 (1872).

196. 22 Q.B.D. 736 (1889). All later smoke nuisance cases are in accord with *Chisholm v. Doulton*, as were those prior to that case. See Baty, *op. cit. supra* note 184, at 207.

197. [1897] 1 Ch. 560. It constituted a criminal nuisance to "permit" refuse to accumulate on a vacant lot.

regulated the questions of mens rea and imputation. Second, unless a statute made it reasonably certain that the legislator meant to dispense with mens rea requirements, the judges were cautious to extend absolute liability even in the nuisance cases, possibly as a result of the impact of *Regina v. Tolson*.¹⁹⁸

American cases on the subject of criminal liability for nuisance are sufficiently numerous to permit a classification into three groups: (1) those believed to impose direct absolute liability, (2) those believed to impose vicarious liability, and (3) those clearly requiring some form of mens rea.

(1) In a number of cases the courts seem to have imposed absolute liability for criminal nuisance, though in the disguise of requiring an intent to do that which in fact amounts to a nuisance, with the qualification that this intent need not be "evil". In other words, conduct is required. In *Troops v. State*¹⁹⁹ the court stated that "malice" was not required.²⁰⁰ In *Seacord v. People*,²⁰¹ the court found it "immaterial whether the defendant intended the prejudicial result to others or not . . .,"²⁰² as long as he intended to do what in effect amounted to the nuisance.²⁰³ In *People v. Burtleson* the Utah court found that defendant's sheep had polluted a small river; defendant was found guilty of knowingly having suffered what in effect amounted to a nuisance, intent and motive being irrelevant.²⁰⁴

The extent of liability under this rule is indicated in a few cases in which the defendant had acted with the advice of competent experts. *Chute v. State* concerned a building in danger of falling, which was held to constitute a criminal nuisance for which the owner was responsible;²⁰⁵ the court ruled that the defendant had been properly refused to introduce evidence that he had consulted a competent builder about the necessity for repair of the building. But the court did indicate that excusable ignorance — a term which

198. [1889] 23 Q.B.D. 168 *Attorney General v. Todd Heatley* notwithstanding, see Baty, *op. cit. supra* note 184, at 211.

199. 92 Ind. 13 (1883).

200. Which is a statement not to the point. It is clear that malice is not required. What is not clear is whether or not there must at least be a selfish frame of mind in disregard of the rights of others in doing the act.

201. 121 Ill. 623, 13 N.E. 194 (1887) (animal carcass nuisance).

202. *Id.*, at 631, 13 N.E. at 197; *accord*, *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, 72 N.E. 1037, 107 Am. St. Rep. 190 (App. Ct. 1905).

203. See also *State v. Boll*, 59 Mo. 321 (1875). It was not alleged that the defendant intended any harmful result. He was merely held criminally responsible for maintaining what in effect amounted to a nuisance.

204. 14 Utah 258, 47 Pac. 87 (1896); see *Salt Lake City v. Young*, 45 Utah 349, 145 Pac. 1047 (1915) (pollution by defendant's 27 horses); *accord*, *United States v. Fraser*, 156 F. Supp. 144, 147 (D. Mont. 1957) (statute).

205. 19 Minn. 271 (1872).

was not defined—might perhaps have been a good defense.²⁰⁶ A similar case was *State v. Gould*.²⁰⁷ Defendant was found to have obstructed a highway by building a fence over part of it, under mistake of fact as to the proper boundary of the highway. He had acted after consultation with the official county surveyor. The county surveyor's error did not excuse the defendant. But the court did not want to state a universal rule. *Obiter* it was said that accident might have been an excuse. But where the factual result had been achieved with the intention of achieving this factual result, there could be no excuse. More specifically, on an indictment for nuisance by obstructing the highway it is not necessary that the defendant commit the act with "malice," nor is it necessary that he intends to obstruct the highway, as long as he causes what amounts to an obstruction intentionally, rather than by accident.²⁰⁹ This indicates a willingness to dispense with mens rea but not with actus reus.

Commonwealth v. Dicken is in accord.²¹⁰ Good faith and error of fact were no defense. A similar holding is *State v. Portland*.²¹¹ The city was held liable for a nuisance caused by a faulty sewerage system. The fact of offensiveness of the system, *i.e.*, the fact of nuisance, was said to give an irrebuttable presumption of negligence, which could not be overcome by the showing of care to prevent the harm, nor by the fact that the nuisance was carried on for the benefit of the community as a whole. In *State v. White* the defendants were found guilty of the nuisance of wilfully and knowingly obstructing the public highway.²¹² Innocent acts done in good faith would not fall under this nuisance statute, the court remarked, but all those who participated in the acts which resulted in an obstruction of the public highway, no matter what they thereby intended to achieve, were guilty of the nuisance. But the ignorant corporation president who did not actually participate in the offense, was found not to be guilty. In *People v. Cooper* a corporate officer who in fact had participated in the creation of the nuisance was thought to be guilty of the offense, if the corporation itself could be found guilty.²¹³

(2) A search for cases which impose strict vicarious liability produced but two doubtful authorities. In *People v. Detroit White*

206. *Id.* at 279.

207. 40 Iowa 372 (1875).

208. *Id.* at 374.

209. For majority rule, *contra*, see note 226, *infra*.

210. 145 Pa. 453, 22 Atl. 1043 (1891).

211. 74 Me. 268 (1883).

212. 96 Mo. App. 34, 69 S.W. 684 (1902).

213. 200 App. Div. 413, 193 N.Y. Supp. 16 (2d Dep't 1922).

Lead Works both the corporation and its officers were fined for creating and maintaining a nuisance by permitting the works to emit offensive odors.²¹⁴ It was clearly established that the corporate officers had no active part in the production of the odors. One might venture to say that the court reached the result on the theory that perhaps the officers could have prevented the nuisance had they properly inspected the works from time to time, and that, therefore, the conviction was a punishment for the officers' failure of supervision, rather than for the unlawful acts of their employees.

The second case is *State v. Pennsylvania R. Co.*²¹⁵ It was established that locomotive engineers "habitually" emitted smoke from the funnels of their locomotives in the particular locality. From this "habit" the court concluded that the corporation should have been put on notice of this unlawful undertaking. The very habit, repetition, or continuity which is necessary to make certain otherwise lawful acts a nuisance was thought to be a fact that ought to appraise the corporation of the habitual commission of the acts. This is only a more sophisticated way of saying that the nuisance should put the corporation, through its officers, on notice of the nuisance. Having established this, the court could now conclude that the corporation, as the principal, is liable for the nuisance of the locomotive engineers which the corporation knowingly suffered. Fortunately, this part of the case has the weight of dictum only, as the court concluded: "For all that appears, the case may be . . . that the company directed its firemen to make as much smoke as possible."²¹⁶

(3) These few doubtful authorities notwithstanding, it appears to be the overwhelming consensus of American judicial opinion that nuisance is a misdemeanor requiring some form of mens rea. The definition of criminal nuisance as an omission or neglect to perform a public duty, or as arising from an unlawful act, itself is indicative of the form which mens rea takes in this misdemeanor.²¹⁷ The omission to perform a public duty is the violation of an *ought* premise, based on at least an *ought scienter*. Thus, in *People v. Albany* the court operated under the premise that the mayor, the aldermen and the commonalty of the city ought to have known of the nuisance by unwholesome stench, produced by a sewerage system which the

214. 82 Mich. 471, 46 N.W. 735, 91 L.R.A. 722 (1890).

215. 84 N.J.L. 550, 87 Atl. 86 (1913).

216. *Id.* at 555, 87 Atl. at 88. This case is of some prominence in the law of corporate officers' criminal liability, which is not to be discussed here. See Mueller, *op. cit. supra*, note 31.

217. Defined in *People v. Albany*, 11 Wend. 539 (N.Y. 1834).

court regarded as having been negligently constructed.²¹⁸ Those indicted ought, then, to have taken steps to prevent the continuance of the nuisance. The culpable failure to realize, or to become aware of, the nuisance is the crux of mens rea in criminal nuisance. This was best stated in *People v. Borden's Condensed Milk Co.*, where the court defined the necessary mens rea as a complete indifference to the rights of others, *i.e.*, carelessness.²¹⁹ Mens rea in criminal nuisance, thus, is "independent of any positive purpose of annoyance," it is merely "self concentration" and a failure to think of anybody but himself.²²⁰ In *People v. Hess* the court addressed itself to the "apparent confusion with respect to the use of the words 'criminal intent' with reference to a public nuisance."²²¹ Defendant and his company had installed 600 cheap burglar alarm systems in stores in New York City. By reason of deficient construction, the alarm bells would frequently start ringing without cause, with the same noise as that which would be caused by intruders. Defendant had sixty private patrolmen stationed in the area in which the bells were installed. Upon the ringing of the bell, which could be heard in a radius of 700 feet, and which would be heard by one of the patrolmen sooner or later, the defendant would be notified. Hours would pass until the ringing of the bell could be stopped. The court had no difficulty finding the defendant's mens rea in the complete disregard of the rights of others over his own business interest.

As a matter of law, however, such an inference of criminal guilt, or mens rea, merely rests on a presumption. In *People v. Hess* this presumption was virtually irrebuttable, paralleling the *res ipsa loquitur* of tort law.²²² In *Mergentheim v. State* the facts were not as strong.²²³ The defendant merely lived close by his property on which the nuisance was being maintained. The presumption of his guilt, arising out of the commission of nuisance, was nevertheless held to be rebuttable.

How such a prima facie guilt for criminal nuisance can be rebutted is best shown in the cases dealing with nuisance in obstructing a highway. This nuisance is today entirely statutory, but usually declaratory of the common law. The statutes require a "wilfull"

218. *Ibid.*

219. 165 App. Div. 711, 151 N.Y. Supp. 547 (2d Dep't 1915). The corporation's intent was the carelessness of the employees in noisomely handling milk cans in early morning hours with complete disregard for the well being of neighbors.

220. *Id.* at 714, 151 N.Y. Supp. at 549.

221. 110 Misc. 76, 80, 179 N.Y. Supp. 734, 777 (Gen. Sess. N.Y. Co. 1920).

222. See cases on direct liability, § (1), *supra*.

223. 107 Ind. 567, 8 N.E. 568 (1886).

obstruction. "Wilfull" could be interpreted as referring merely to the mental process of the act which constitutes the nuisance.²²⁴ That would amount to an imposition of absolute liability, especially if the nuisance arose out of lawful pursuit; was not accompanied by the actor's carelessness; or was even the result of competent advice. Almost universally the courts have rejected such a rule. In *People v. Eckerson* the court found that the defendant's acts were in lawful pursuit of his activity; that the nuisance was not a natural result of these acts; and that the defendant's mind was not tinged by carelessness.²²⁵ In four other cases the defendants even acted on the advice of the competent highway commissioners, or after a search of the county records. Universally the convictions were reversed.²²⁶

Defendants who rely for their action on official advice, thus, are nearly certain to escape punishment for criminal nuisance. But even in some less obvious cases, merely arising out of lawful pursuit of business, some courts directed dismissals of the charges of criminal nuisance. Thus, when a Texas court found that the nuisance with which the defendant was charged was merely incidental to a lawful activity, irrigation, it concluded that there was a total lack of "criminal intent," and ordered the case dismissed.²²⁷ In *Stein v. State* the Alabama court extensively treated the question of intent in criminal nuisance. The charge was the supply of unwholesome or poisonous water to the city, by the licensee of the city water works. The defendant, it found, could not be held responsible unless he intentionally supplied what he actually knew to be poisonous or unwholesome. Mere carelessness was not sufficient mens rea.²²⁸ In *Cumberland Pipe Line Co. v. Commonwealth* the Kentucky court reached the same conclusion, requiring that the defendant must be shown to have been at least culpably negligent in the construction and maintenance of its leaking oil pipe line.²²⁹ This restriction on the imputation to a corporation of the acts of officers or employees, through whom the corporation necessarily acts, applies with the same force to other quasi-agency relationships. Thus, a landlord cannot be held responsible for the nuisance committed by his tenant, in the form of a house of prostitution, unless he has shown his assent by some affirmative act.²³⁰

224. As in *State v. Gould*, *supra* note 207, the only highway case so holding.

225. 133 App. Div. 220, 117 N.Y. Supp. 418 (2d Dep't 1909).

226. *State v. Preston*, 34 Wis. 675 (1874); *State v. Cummerford*, 16 Kan. 507 (1876); *Parsons v. State*, 26 Tex. Crim. 192, 9 S.W. 490 (1888); *People v. Croune*, 51 Hun. 489, 4 N.Y. Supp. 266 (Sup. Ct. 3rd Dep't 1889).

227. *Stacey v. State*, 54 Tex. Crim. 610, 114 S.W. 807 (1908).

228. 37 Ala. 123 (1861).

229. 214 Ky. 698, 283 S.W. 1039 (1926).

230. *Iowa v. Abrahams*, 6 Iowa 116 (1858).

Thus, it may be concluded that:

(a). Nuisance is a common law misdemeanor requiring mens rea in the form of carelessness, or, according to some decisions, culpable negligence. This implies that bona fide mistake of fact will constitute a defense, and that persons otherwise chargeable cannot be convicted unless they lacked scienter culpably.

(b). In England, at least according to some judges, the rule was otherwise for several decades during the 19th century.

(c). A number of American nuisance cases seem to impose absolute liability for direct creation of a criminal nuisance, on the theory that the intent to do what in fact amounts to a nuisance is sufficient mens rea. Under this rule a showing of accident, but not a showing of mistake of fact, would constitute a defense. These cases are based on either tort law precedent or statutory authority where the legislator attempted to dispense with common law mens rea requirements. On common law principles these few cases present indefensible holdings and should not be regarded as authoritative.

D. Miscellaneous Cases

1. CONSPIRACY

In his work on Criminal Law, Glanville Williams noted that apart from the apparent exceptions, which are among those discussed in this chapter, "[t]here does not seem to be any instance of strict responsibility at common law, [e]xcept possibly conspiracy, which may take its color from the illegal act that it is conspired to commit."²³¹ After a brief discussion of two English cases possibly so holding, the learned author concludes that conspiracy as "a common law misdemeanor requires mens rea."²³² In the United States this has never been doubted. In fact, here the conspiracy to commit a statutory misdemeanor of strict liability "not only needs mens rea but needs knowledge of the statutory prohibition, conspiracy being an exception to the rule that ignorance of the law is no excuse."²³³

If conspiracy can at all be regarded as inconsistent with ordinary common law principles, so only with respect to the liability for a mens rea evidenced by an overt act which in other crimes would be an insufficient actus reus.²³⁴ This means that in the common law misdemeanor of conspiracy, mens rea is overemphasized (as in attempts) rather than de-emphasized. Lastly, the very fact that com-

231. Williams, *op. cit. supra* note 16, at 238, note 2.

232. *Id.* at 263.

233. *Ibid.*, and authorities cited there.

234. This has special application to conspiracies to do that which it would be lawful to do for one person singly, under the so-called *Hawkins' Doctrine*. See Sayre, *The Crime of Conspiracy*, 35 Harv. L. Rev. 393 (1922).

mon law conspiracy is a misdemeanor guards against the possibility that the departure from the original scheme by one conspirator through commission of a graver offense will subject the other conspirators to a liability for an offense not encompassed by their mens rea.

2. NON-PERFORMANCE OF NON-DELEGABLE DUTY

Sears and Weihofen recognized that a group of cases, apparently imposing vicarious liability, did not proceed on that theory, but based liability on a principal for the acts of his agent under circumstances of duty which the courts found could not be delegated.²³⁵

The most numerous examples under this rule are cases of homicide through reckless driving. *Moreland v. State* is a representative example.²³⁶ The defendant's chauffeur drove the automobile in flagrant violation of several traffic laws, causing the death of the driver of another car. The defendant owner was a passenger in the car. Ownership and presence were held to be constructive knowledge of the violation of the law. Based on this scienter the court could proceed to hold the defendant guilty for his failure to properly restrain his driver, who had escaped after the accident. In this case the facts from which the court concluded on a guilty conscience in the principal were particularly strong. Rebuttal of the imputation of scienter was impossible. In less flagrant cases, however, the courts have made it clear that the presumption of scienter, and with it the inference of guilt, is a rebuttable one. So in *Commonwealth v. Sherman*,²³⁷ where the court spoke of a prima facie presumption that the owner of the automobile, who was present, directed its operation in the manner which caused the death. In that case the court found that, in addition, the defendant owner actually "participated in the vehicle being run. . . ." ²³⁸ He was held liable on ordinary common law grounds as an accessory. A similar holding was *Rex v. Baldesare*.²³⁹ There the court found that all persons in the car were joy riders with a "community of purpose and action," and were all equally guilty.

In some states similar holdings are based on statutes which regulate questions of imputation and liability. *Ex parte Liotard* was a case decided on such a statute.²⁴⁰ The court found that the legis-

235. May, *op. cit. supra* note 79, at 46.

236. 164 Ga. 467, 139 S.E. 77 (1927).

237. 191 Mass. 439, 78 N.E. 98 (1906).

238. *Id.* at 440, 78 N.E. at 99.

239. 222 Cr. App. Rep. 70, 144 L.T. 185, 29 Cox. 193, 22 C.A.R. 70 (1930).

240. The cases under this topic are collected and annotated at 99 A.L.R. 756, 771-72 (1935).

lature had made criminal intent no element of the crime, but it is clear that mens rea in the form of carelessness was required. Carelessness in fact is the basis of liability in all cases of this nature, though in a few instances the courts could actually hold the defendant owner liable as a principal or accessory.

The term "non-performance of a non-delegable duty" itself was coined by Judge Cardozo in *People ex rel Price v. Sheffield Farms-Slawson-Decker Co.*²⁴¹ In that case the defendant was held criminally liable for a violation of the child labor law, for his failure to discover that one of his agents had employed a minor. Defendant had simply violated his statutory duty of reasonable supervision. Not respondeat superior, but his own carelessness prompted his liability. Again, we can hardly speak of strict, or even absolute liability in this case.

Cases involving minors appear to be the only other group of cases falling under the "unlawful delegation" rule. In *DeZarn v. Commonwealth* the defendant pool room owner had "completely delegated" his duty of lawful operation of the enterprise to one of his employees, whom he knew to violate the law with respect to the exclusion of minors!²⁴² The defendant did not have knowledge of the minority of the witness for the prosecution. But for reasons of the general knowledge of violation of the law by his agent, the owner was held responsible. Sears and Weihofen questioned the outcome of this case, but, again, if carelessness is one of the forms of common law mens rea — and we know that it is — the case seems sound on principle. In these cases it is clear that liability is not imposed on the legally (and morally!) innocent party, as is shown by, for example, *Justice v. Commonwealth*.²⁴³ There the defendant pool room owner was held to have had a good defense when he relied on a forged letter of parental consent — one of the statutory exceptions — despite the absolute legal voidness of forged instruments. As in the automobile-homicide cases, in many jurisdictions statutes now regulate the extent of liability in this class of cases.²⁴⁴

3. Agent Acting Under Direction of Principal

Occasionally a court will ornament its opinion with a statement to the effect that a "principal is liable for the illegal acts of his

241. 225 N.Y. 25, 121 N.E. 474 (1918).

242. 195 Ky. 686, 243 S.W. 921 (1922).

243. 213 Ky. 617, 281 S.W. 803 (1926).

244. The cases involving pool room regulations and liability of owners and operators for statutory violations are collected at 29 A.L.R. 41 (1924) and 53 A.L.R. 149 (1928).

agent done under his direction," as did the New Jersey Court in *State v. Lisena*.²⁴⁵ Such statements must be viewed with great caution. Subject to what has been noted in the previous sections, criminal courts mean by "direction" actual command or supervision of the unlawful activity. Only civil courts impose liability on the principal for acts done by the agent in the general scope of the business, and in that respect under the principal's "direction." This is borne out by the *Lisena* case which was decided under the New Jersey law pertaining to receiving stolen property.²⁴⁶ The statement of the court in that case, coupled with the liberal reliance on circumstantial evidence, might lead a superficial observer to the conclusion that the court imposed vicarious, *i.e.*, strict, liability. Such is not the case. The law does operate freely with presumptions and has shifted the burden of going forward.²⁴⁷ But mens rea as well as participation are essential to conviction. Thus, the knowledge that the goods have been stolen must be proven.²⁴⁸

In England the rule of liability is similar. *Attorney General v. Siddon*²⁴⁹ stands for the proposition that the finding of smuggled goods on the master's premises, but in the servant's control, is prima facie evidence of the master's guilt, although the case is unfortunately much better known for the proposition, superficially conceived, that the master is liable for the wrongful act of his servant committed in the master's absence, but in the scope of his employment.

In these cases the principal or master could not exculpate himself, but this is no indication of an insurmountable onus of rebuttal, and consequent strict liability. The law is well settled that criminal liability does not attach to the master whose servant commits an unlawful act entirely on his own, and without the master's knowledge. "Scope of employment" may make for liability in tort law, but it does not do so in criminal law.²⁵⁰

245. 129 N.J.L. 569, 572, 30 A.2d 593, 595 (1943).

246. *Ibid.*

247. See Note, 6 Rutgers L. Rev. 307 (1952).

248. *State v. Vigorito*, 1 N.J. Super. 151, 62 A.2d 823 (1948); *State v. Jusiak*, 16 N.J. Super. 177, 84 A.2d 485 (1951); see Tyree, *Evidence*, 4 Rutgers L. Rev. 252, 259 (1950).

249. 1 Crompt. & J. 220, 148 Eng. Rep. 1400 (K.B. 1830).

250. *E.g.*, *Nall v. State*, 34 Ala. 262 (1859) (sheriff was held not to be criminally liable for the escape of a prisoner, negligently caused by a jailer who, against the sheriff's orders, had disobeyed the deputy's instruction); *State v. Bacon*, 40 Vt. 456 (1868) (experienced employee drove a horse cart with coal on the side walk, for more convenient delivery of the coal, without the employer's knowledge or consent, the employer was held not liable). This rule has never been altered.

4. Criminal Omissions

The principle that criminality may be occasioned by omission as well as action is too well known to require any citation of authority.²⁵¹ Nor are the mens rea requirements for omissions any different from those for acts, although in the larger number of crimes or misdemeanors by omission the mens rea required is adequate rather than commensurate, as I have defined these terms. Thus, in omissions we are more likely to encounter negligence, recklessness and carelessness, particularly the latter.

An occasional case may come up in which the court is not overly explicit about the necessary mens rea. This can lead to the supposition that the court imposes strict liability, usually of vicarious nature. Such cases are rare, though easily recognizable. No attempt to collect them shall be made here, and one demonstrative example may suffice to put the reader on guard. In *Britain v. State* a master was convicted for indecent exposure, committed by one of his slaves.²⁵² On closer analysis it will be found that the court convicted the defendant for his utter disregard of the slave's well being, his carelessness, or his neglect to provide the slave with decent clothing, forcing the slave to walk about in torn rags which did not cover the body in a lawful and decent manner. The act of lewdness was that of the master, who exposed the slave to the public in an indecent manner. His mens rea was that of carelessness. The slave cannot be said to have had any intent to indecently expose herself, and even if one would attempt to infer her attempt from the fact that she was indecently exposed, the facts were clear enough to invoke necessity as an exculpatory ground in her behalf.

Examination of other alleged instances of absolute criminal liability at common law: (a) reveals that in conspiracy the common law overemphasizes, rather than de-emphasizes, mens rea; (b) makes it clear that a group of cases of so-called "non-performance of non-delegable duty" and "agents acting under the direction of their principals" are nothing but instances of vicarious liability in its reasonable form, *i.e.*, supplemented liability of a principal for the unlawful act of his agent, committed because of lacking supervision and restraint on the part of the principal. These offenses operate with mens rea, of the adequate form, in a realistic manner and do not constitute departures from the mens rea doctrine; (c) with respect to crimes of omission, shows that these are subject to the same general mens rea requirements as crimes of commission. Statutes

251. And see Part I, text at note 17, *supra*.

252. 3 Humph. 203 (Tenn. 1842).

frequently call for an adequate, rather than commensurate, form of mens rea.

III. GENERAL CONCLUSION

Common law mens rea is not the mere psychic relation between act and actor, it is, rather, the ethico-legal *negative* value of the deed. More specifically, it is a community value, evidenced by law, of which the perpetrator at the time of the deed knows the existence and that it will materialize when the deed becomes known, or else, which the perpetrator fails to appreciate despite the capacity and opportunity to do so. In short, it is the individual blameworthiness in a legally relevant and specified form. Contrary to general belief there are no common law offenses in which mens rea is not required, notwithstanding an insignificantly small number of badly reasoned cases to the contrary. *Ergo*: The imposition of criminal liability, blame, for individual blameworthiness only, proves the *ethico*-legal nature of the mens rea concept at common law and, consequently, one of the ethical foundations of the common law of crimes.

Lambert v. California: THE MORAL DECISION²⁵³

However much we may clamor and demand that advocates and judges should be mindful of the total legal and extra-legal context of each controversy, it is not their province to reflect the totality of human recognition in every individual case. Were it otherwise, counsel and amicus curiae for Mrs. Lambert might have made a vigorous argument, perhaps on constitutional grounds, against the attorney general's—and commonly accepted—interpretation of the California act-and-intent statute, very much as this has been attempted in this paper. Such an argument probably would have been futile in court. And so we find not a single word in specific reply to the attorney general's argument on this point. Instead, the chances of attacking the trial court's decision on the moral issue solely—disregarding historical-technical subtleties and meta-legal recognitions—appeared much more promising. But again, no attempt was made to attack on a broad policy front. However much Lambert's attorneys may be in agreement with the moral proposition that any absolute criminal liability is immoral—and in that sense inconsonant with due process—their arguments were concerned solely with:

(a). an ordinance passed for the purpose of regulation, though

253. I am purposefully alluding to the title of Professor Cahn's widely acclaimed book Cahn, *The Moral Decision* (1955), the *leitmotiv* of which may well have guided Mr. Justice Douglas in the *Lambert* case.

outside the sphere of the group of typical public welfare offenses,²⁵⁴

- (b). which provided for no sufficient means of notifying persons concerned;
- (c). which attempts to induce a certain act, rather than forbearance;
- (d). regulating conduct which is not generally known to the general public or specifically affected persons to be subject to regulation, and
- (e). a defendant completely ignorant of the regulation,
- (f). not under any express or implied duty to know of the regulation and
- (g). not having a chance to rectify her existing violation of the law upon first notice thereof.²⁵⁵

Reasonable men may differ about the propriety of absolute liability in the area of conduct regulation where everybody concerned knows of legislative intervention. But in a case like *Lambert v. California* there could be little disagreement. The moral issue was clear: this conviction does not accord with notions of morals, whatever we may wish to call these notions, *e.g.*, due process, fair play and substantial justice, etc. The issue of utility was equally clear: no good could come from punishing a defendant under those circumstances. To the contrary, general frustration and disrespect for the law might result if substantial criminality were to rest on substantial innocence. This, it was argued on Lambert's behalf, is a case of substantial criminality, and true criminality requires proof of awareness of wrongfulness.²⁵⁶

Mr. Justice Douglas, for the majority, seized upon the issue of the inherently moral implications of criminal guilt, as demonstrated by the needs of this case. Referring to the traditional requirement of notice in cases of penalties and forfeitures, he remarked: "the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."²⁵⁷ And he concluded: "Where a

254. Broadly defined by Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933). Amicus curiae went as far as to concede, for the sake of the argument, that absolute criminal liability may well have a place in that type of offense. Brief of Amicus Curiae for Appellant, p. 18, *Lambert v. California*, *supra* note 2.

255. Impressions culled from Brief of Amicus Curiae for Appellant, pp. 8-20, *Lambert v. California*, *supra* note 2. Aspects of arguments not passed on by the court, *e.g.*, unreasonableness of the ordinance, are not to be considered in this essay.

256. *Id.* at 19, citing Hall, *General Principles of Criminal Law* 279-322 (1947); Allen, Book Review, 66 Yale L.J. 1120 (1957); Mueller, *Mens Rea and the Law Without It*, 58 W. Va. L. Rev. 34 (1955).

257. *Lambert v. California*, 355 U.S. 225, 228 (1957).

person did not know of the duty . . . and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process."²⁵⁸

Mr. Justice Frankfurter's dissent, joined by Mr. Justice Harlan and Mr. Justice Whittaker, is a terse statement of allegiance to the police power device of absolute criminal liability, concluding confidently that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."²⁵⁹

That the dissenters completely failed to appreciate the moral issue of mens rea and the enormous advance toward ethicization of our penal law which the decision constitutes, becomes most apparent in this statement from the dissenting opinion: "If the generalization that underlies, and alone can justify, this decision were to be given its relevant scope, a whole volume of the United States Reports would be required to document in detail the legislation in this country that would fall or be impaired."²⁶⁰ If it were necessary to perform such an Augean task in order to cleanse our penal law, it should be an enjoyable task, and those of us who *ex cathedra* have long advocated a return to the ethico-legal mens rea concept should gladly volunteer. But this is not necessary because the number of statutes which expressly and directly, or by express rules of general construction, require the imposition of absolute criminal liability, is comparatively small. If courts were fully aware of the nature and mandate of common law mens rea, especially as distinguished from the mental ingredient in conduct, the issue would resolve itself.

The California act-and-intent statute is but a codification of the common law mens rea requirement. But neither it nor the common law mens rea have been properly understood. Once it is recognized that the common law created the doctrine of mens rea as a protection against unjust conviction of the blameless and that the common law regards mens rea as a universal requirement, technical and jurisprudential difficulties are at an end. In terms of due process this recognition simply means: that judges no longer confound intent and mens rea; that judges apply the common law rule according to which mens rea is a universal requirement, whether or not the statutory definition contains words indicative of mens rea, such as "intentionally"; that act-and-intent statutes are codifications of

258. *Id.* at 229-30.

259. *Id.* at 230. Mr. Justice Burton dissented because he believed that, as applied to this appellant, the ordinance does not violate constitutional rights.

260. *Id.*, at 232.

the common law requisite of mens rea and should be treated as such; and that statutes attempting to abolish a universal mens rea requirement—and these are rather rare—are unconstitutional, as are judicial utterances, in the nature of judicial legislation, to that effect.

Lambert v. California did not and could not lay down such broad, yet definite, requirements. But it unmistakably points the way in the right direction and will ultimately lead to a complete moral recovery of our penal law. Mr. Justice Douglas' decision is not a sweeping condemnation of all absolute criminal liability, but a carefully limited ban covering all offenses of omission in which, by the nature of the definitional elements, the defendant was not, and could not be, aware of any wrong-doing.²⁶¹ Presumptively this leaves unaffected all offenses of commission in which, as Mr. Justice Douglas perhaps assumed, those subject to the conduct regulation always are appraised of the possibility of legislative regulation and therefore should keep posted. It also excludes offenses of omission in which, conceivably, the defendant belongs to a class of persons which traditionally has been subjected to regulation. In other words, by implication an arbitrary group of offenses has been left to possible absolute liability. All these unaffected offenses have in common that presumptively the offender could not have been excusably ignorant of wrongdoing. But this leaves us on swampy ground. Unquestionably the distinction between active and passive conduct has something to commend itself, though it is not necessarily true that the likelihood of unawareness of wrongfulness is smaller in cases of active conduct. Both error and ignorance of fact and the regulation must be considered. Thus, a distinction should be made between excusable and unexcusable (subject to further precisation) unawareness of wrongfulness, but not between active and omissive offenses. These are questions of the future to which careful thought must be given before sensible results can be achieved. For the present, the really important and encouraging matter is that the Supreme Court has clearly told us that it detests the immoral use or misuse of the criminal sanction in the case of a morally blameless defendant. The Court has reaffirmed the proposition, long forgotten by many, that mens rea is an ethico-legal concept. Absolute criminal liability is beginning to end in America.

261. Such a sweeping statement, with the weight of dictum only, might have created the greatest difficulties at this point, possibly opening the door to all kinds of spurious defenses.